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Fundamental Principles for Class Action Governance

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FUNDAMENTAL PRINCIPLES FOR CLASS ACTION GOVERNANCE

ALEXANDRA LAHAV*

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INTRODUCTION

Class actions face a crisis of governance. The form of governance provided by Rule 23, governance by representative parties, is both vague in theory and ignored in practice.¹ Instead, by a combination of procedural rules, judicial interpretation and common practice, the class is governed by attorneys with limited judicial oversight. This regime neither reflects the basic insight that the

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1. See FED. R. CIV. P. 23(a)(4) (requiring representative parties who will “fairly and adequately protect the interests of the class” as a prerequisite to bringing a class action). My discussion of Rule 23 addresses the Rule as amended in December 2003.

class and attorney do not have a traditional attorney-client relationship nor performs the task of transforming the inchoate collectivity of the class into an organization that protects and is responsive to the interests of class members.² This Article proposes an alternative regime of governance for 23(b)(3) small claims class actions³ that accomplishes both these things, based on four fundamental principles: mandatory disclosure of material information, an actively

2. As a recent RAND study observed, procedural rules “provide only a weak bulwark against self-dealing and collusion.” DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 120 (RAND 2000).

3. This Article focuses on small claims class actions, sometimes referred to as “negative value claims” because litigating the claim will result in a loss to the claim-holder. These are the quintessential class actions and encompass mostly consumer class actions. I define these as claims with a predicted individual award of under \$10,000. This Article does not address mass tort class actions, or aggregative litigation, where there are often substantial money damages sufficient to justify individual suits as well as large differentials in potential recovery, punitive damages class actions, or non-opt out class actions brought under Rules 23(b)(1) and 23(b)(2), although the principles articulated here may also be applicable to these cases. I have chosen to address the quintessential class action, which, according to the Supreme Court and other commentators, is the least problematic. Consumer class actions constitute one third of the class actions brought, and thus are a significant presence in the class action world. See HENSLER ET AL., *supra* note 2, at 49-123 (describing that in 1995-96, class actions were mostly damages 23(b)(3) class actions, not civil rights or social reform, and estimating that one third of class actions against businesses are consumer class actions not including securities class actions). Many scholars consider consumer damage class actions to be prototypical. See Jules Coleman & Charles Silver, *Justice in Settlements*, 4 PHIL. & LAW 102, 122 (Autumn 1986) (describing consumer class actions with small recoveries as “paradigm class actions” because no one would bring them if the class action device was unavailable); HENSLER ET AL., *supra* note 2, at 68 (describing actions for money damages as the “traditional paradigm” of class actions). One reason these cases are thought paradigmatic is that they are considered to be a more straightforward use of the class action mechanism than mass tort actions. For example, in *Amchem Products, Inc. v. Windsor*, the Court opined in passing that the “predominance test,” so difficult to meet in the mass tort context, is “readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws.” 521 U.S. 591, 625 (1997). See also Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 750 (2002) (observing that in the context of securities, antitrust, and consumer litigation “the prospect of effecting a comprehensive peace through a class settlement poses little threat to the autonomy of class members”); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 386 (2000) [hereinafter Coffee, *Accountability*] (arguing that internal conflicts are not typically present in “commercial class actions because . . . in these cases, some objective measure” of damages permits automatic allocation without discretion). Among other things, I hope to show that the same intractable problems faced in mass tort and other more complex contexts are also present in consumer class actions. I hope this Article will illustrate how very problematic small claims or “negative value” class actions are. The law and policy concerning these different types of class actions is so varied that no one system of governance—never mind a single procedural rule—should be applied across the board to all types of class actions.

adversarial process, expertise of decisionmakers, and independence of decisionmakers from influence and self-interest.

In a class action, absent persons, who may or may not want to be part of a lawsuit, receive notice that they are part of a class action or that they are part of a class action settlement.⁴ They are denied the power to define the parameters of their group.⁵ They do not pick their representatives,⁶ and have no power to

4. FED. R. CIV. P. 23(c)(2) provides:

In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

5. In many cases, the attorneys will first seek certification of a class with specific parameters, then change the parameters of the class as part of a settlement or in preparation for trial. See HENSLER ET AL., *supra* note 2, at 217 (discussing *Selnick v. Sacramento Cable*, where the attorney filed an amended complaint extending the class definition in preparation for trial); see also Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439, 444-45 (1996) (discussing the problem of ensuring proportional allocation where there is no "natural class"). Because global peace—or the ability to lay to rest the most possible claims—is of special interest to defendants, the practice of enlarging the scope of the class as part of settlement can smack of collusion.

6. The observation that the class does not pick its attorney and that the class representative is merely a figurehead has become commonplace among scholars. See, e.g., Coffee, *Accountability*, *supra* note 3, at 406 ("Commentators have generally agreed that the representative in a class action is more a figurehead than an actual decision-maker."); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 877 (1987) [hereinafter Coffee, *Entrepreneurial Litigation*] (referring to client control of litigation decisions in the class action as a "noble myth"); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 805 (1997) (noting that courts determine adequacy of representation based on "representations of counsel who have little if any connection to the parties to be bound"); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1149 n.1 (1998) ("Once enmeshed in a class action, class members cannot shape their own claims, and their individual rights to participate in the class proceeding are quite limited."). The acceptance of the proposition that the actual relationship between the class and the class counsel is irrelevant is illustrated by the proposed Rule 23(g), which provides a series of factors for court approval of class counsel: the one factor conspicuously absent from the list is client approval. See also *Stewart v. Gen. Motors Corp.*, 756 F.2d 1285, 1295 n.5 (7th Cir. 1985) (quoting *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co.*, 481 F.2d 1045 (2d Cir. 1973)).

One accepting employment as counsel in a class action does not become a class representative through simple operation of the private enterprise system. Rather, both the class determination and designation of counsel as class representative come through

dismiss those representatives.⁷ Instead, as a practical matter, class counsel defines the group membership, manages the litigation, makes unilateral strategic decisions, oversees the accrual of fees and costs, and shapes the outcome of a mysterious process class members neither launched nor agreed to resolve.⁸ It is not surprising, then, that class actions have been criticized as mechanisms by which attorneys exploit disunited class members and garner enormous fees, while claimants recover minimal damages.⁹ Nor is it surprising that 47% of Americans believe that consumer class actions benefit plaintiffs' lawyers most and 20%

judicial determinations, and the attorney so benefited serves in something of a position of public trust.

Id. at 1050. There are, however, exceptions to this. Empirical studies have found that class representatives sometimes seek out attorneys, rather than the other way around. *See* HENSLER ET AL., *supra* note 2 (describing examples of different relationships between class counsel and class representatives). Institutional investors may act as lead counsel in securities class actions. 15 U.S.C.A. § 78u-4 (West 2003). *Cf.* *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 483 (5th Cir. 2001) (holding that "PSLRA's requirement that securities class actions be managed by active, able class representatives who are informed and can demonstrate they are directing the litigation" raises the standard adequacy threshold in Rule 23). Thus, the class representative is a representative in the formal sense, that is, that he or she theoretically has the authority to act on behalf of the class, but no conception of popular sovereignty or accountability is imbedded in the mechanisms of representation.

7. This is because after certification, class counsel's ethical obligations run to the class, not to the individual class member. *See In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995) ("Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed."); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 20 (1991) (noting that "the attorney must act for the benefit of the class as a whole and therefore is not obliged to follow the unilateral wishes of any individual class member").

8. Although there may be a presumed requirement that the attorneys consult with the class representatives, if these representatives have been hand-picked by the attorney, such consultation may have little meaning. In any event, the Rules create no obligation for class counsel to consult with the class or answer to class representatives prior to notifying the class or presenting a settlement to the court for approval pursuant to Federal Rule of Civil Procedure 23(e).

9. *See, e.g.,* Jesse J. Holland, *Official: Put Class Actions in U.S. Court*, AP ONLINE, May 15, 2003, available at 2003 WL 55372125 (stating that Justice Department spokesperson asserted that trial lawyers benefit more from class actions than plaintiffs they represent); *see also* Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 180 (2001) [hereinafter Hensler, *Revisiting the Monster*] (noting popular belief that "monsters are loose in the land"); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051 (1996) (arguing that attorneys often abuse their position as class counsel and take advantage of class members in order to increase their fees); Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform*, 64 LAW & CONTEMP. PROBS. 137, 137-39 (2001) [hereinafter Hensler & Rowe, *Beyond "It Just Ain't Worth It"*] (collecting similar criticisms).

believe that they benefit attorneys for defendants most, while only 9% believe that class actions benefit plaintiffs most.¹⁰

A few procedural protections purport to lend legitimacy to this system by enlisting judicial oversight to prevent gross abuses of the class action. In certifying a class, the court reviews the adequacy of the representatives and counsel.¹¹ After the class is constituted and settlement has been reached, class members are given opportunities to opt out or to speak out at a fairness hearing.¹² Nevertheless, an absent class member, not represented by counsel and armed with minimal information, has a very limited ability to take advantage of these mechanisms.¹³ In the best case, class members' interests are represented by responsible objectors. But for the most part, the class is left to rely on the expertise of class counsel and the wisdom of judges to guarantee fairness.¹⁴ Judges approve the class parameters, decide whether or not a settlement is fair, and push the litigation in the direction of settlement or adjudication.¹⁵ Notwithstanding the judge's role in overseeing class actions, fair results are far from guaranteed.

The dispute over whether the benefits of the small claims class action

10. *Opinions on Class-Action Lawsuits*, USA TODAY, Mar. 24, 2003, at B1, available at 2003 WL 5307581.

11. See FED. R. CIV. P. 23(a) (setting forth the requirements for class certification). Certification is no easy feat for plaintiff's counsel to pull off, but nevertheless, meeting the criteria of 23(a) provides no guarantee of good governance.

12. See Fed. R. Civ. P. 23(c)(2) (requiring notice and opportunity to opt out at certification to (b)(3) class members); 23(e) (class action may not be dismissed or compromised without judicial approval); 23(e)(1)(B) (requiring notice of settlement); 23(e)(1)(C) (court may approve settlement upon finding that it is "fair, reasonable, and adequate"); 23(e)(3) (opportunity to opt out at settlement is at court's discretion).

13. One Federal Judicial Center study found that only seven to fourteen percent of fairness hearings were attended by class members who were not objectors or named plaintiffs and that in forty-two to sixty-four percent of fairness hearings there were no objectors at all. Koniak & Cohen, *supra* note 9, at 1105-06.

14. See William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L. J. 1623, 1663-68 (1997) (discussing the benefits and drawbacks of an expertise-based model of group governance). Cf. Coffee, *Accountability*, *supra* note 3, at 406 (characterizing the possibilities of voice under the current Rule 23 regime as a choice "between the uninformed democracy of class members versus the often self-interested professionalism of plaintiffs' attorneys").

15. See FED. R. CIV. P. 23(c) (power of court to determine when class action may be maintained); 23(c)(3) (to determine membership in class); 23(c)(4) (to require sub-classification); 23(d) (to issue procedural orders); 23(e) (to approve dismissal or compromise). See generally Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 U.C.L.A. L. REV. 1471 (1994) (arguing that litigants do not expect to go to trial and that judges, by using rules, doctrine, and practices try to get them to settle).

outweigh its costs is longstanding, much discussed, and unresolved.¹⁶ Among other things, class actions solve the collective action problems faced by individuals with claims too small to be economically adjudicated individually, and address certain small private wrongs with substantial public effects, especially in the absence of governmental intervention.¹⁷ Thus, class actions serve a regulatory function.¹⁸

There are two substantive justifications for permitting groups to litigate through the class action mechanism: compensation and deterrence.¹⁹ Because the

16. "For all our effort, we do not know whether this is a good or a bad thing. The great big question is whether the social utility of the large class action outweighs the limited benefits to individuals, the aroma of gross profiteering, and the transactional costs to the court system." John Frank, 1966 Civil Rules Advisory Committee Member in a memorandum to the chair of the 1995 Committee (quoted in HENSLER ET AL., *supra* note 2, at 401). See also Hensler & Rowe, *Beyond "It Just Ain't Worth It," supra* note 9, at 137-39 (describing ongoing debate over merits of damages class actions); Hensler, *Revisiting the Monster, supra* note 9, at 196 (arguing whether class actions are directed at doing social good or ill "depends substantially on how well judges control the litigation process"). But see Elizabeth J. Cabraser, *Enforcing the Social Compact Through Representative Litigation*, 33 CONN. L. REV. 1239 (2001) (arguing that class action litigation is a beneficial social good).

17. In situations where claims are small, most of the individual class members "would have no realistic day in court if a class action were not available." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). See also *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 n.9 (1980) (describing negative value class action claims); Coleman & Silver, *supra* note 3, at 121 n.60 ("A rational person will refuse to sue on a claim when the opportunity cost of a lawsuit exceeds its expected return (the payoff given that the lawsuit may be won, lost or settled times the probability of each outcome)."). As Arthur Levitt, former Chairman of the SEC, observed, "private litigation is 'the primary vehicle for compensating defrauded investors.'" HENSLER ET AL., *supra* note 2, at 69. The class action mechanism seems to have competing objectives: administrative efficiency and enabling litigation in pursuit of larger social goals. See *id.* at 49. Hensler points out that the "distinction in the public debate between the *efficiency* and *enabling* goals of class actions for money damages is illusory. In practice, any change in court processes that provides more efficient means for litigating is likely to enable more litigation." *Id.* In recent years, there has been an increase of involvement of state attorneys general in consumer issues. This development is an interesting one and perhaps should affect the way policy-makers look at the regulatory role of consumer class actions. On the other hand, this development may be too personality-driven to spur a change in policy towards class actions.

18. "[M]any see class actions as a powerful regulatory enforcement tool and view those who bring them as 'private attorneys general.'" Hensler, *Revisiting the Monster, supra* note 9, at 182-83.

19. Courts have interpreted the class action mechanism as a way to solve the collective action problem of harms that are too small for individuals to prosecute. At the core of this goal is compensation for those individuals. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) ("the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into

aggregation of these small claims has a substantial effect on the defendant, deterrence may have a larger influence than compensation.²⁰ It may be that the smaller the likely compensation to the individual, the more important the deterrence justification becomes.²¹ To the extent that the class action's primary goal is compensation, the objective of its governance scheme should be to maximize claimholder value.²² To the extent that the primary goal is deterrence, the governance regime should be concerned that the amount extracted from defendants is sufficient to further that goal and is properly distributed among class members, the public, and class counsel. This Article assumes that the

something worth someone's (usually an attorney's) labor." (quoting *Mace v. Van Ru Credit Corp.* 109 F.3d 338, 344 (7th Cir. 1997)); 5 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 23.02 (3d ed. 1998). Torts scholars have moved towards the view that tort norms, such as deterrence, are a more appropriate way to view class actions. See David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210, 214 (1996) (proposing a functional approach to mass tort actions, viewing them from point of view of tort policy of minimizing costs of accidents and maximizing deterrence). Scholars recognize a larger social goal for securities class actions. See Janet Cooper Alexander, *Rethinking Damages in Securities Class Actions*, 48 STAN. L. REV. 1487 (1996) (observing that the purpose of securities class actions is to protect the public interest and the integrity of capital markets). These justifications necessarily exclude frivolous class actions brought by attorneys intent on obtaining fees to "blackmail" defendants. See, e.g., Monte Morin, *Lawyers Who Sue to Settle*, L.A. TIMES, Oct. 6, 2002, at A1 (describing attorneys who file suits with the intent to settle for attorneys fees). These types of "blackmail" class actions are not an internal governance problem of the type addressed here, but are an important issue in class action policy generally. For mechanisms to screen class actions, see Hensler & Rowe, *Beyond "It Just Ain't Worth It,"* *supra* note 9. For a discussion of blackmail class actions and suggestions for reform, see Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377 (2000).

20. A pure deterrence perspective does not provide a basis for distributing the proceeds among the class members, but only requires that they be disgorged from the defendant. Cf. Coleman & Silver, *supra* note 3, at 137 (arguing that the principle of compensation does not require that the settlement fund be paid out to class members). It nevertheless seems fundamentally unfair that compensation should mostly go to attorneys at the expense of wronged class members, even if the wrongs themselves are small. When claimants are difficult to find, a charitable fund is one solution. See *In re Mex. Money Transfer Litig.*, 164 F. Supp. 2d 1002 (N.D. Ill. 2000) (approving settlement that included *cypres* fund where claimants were illegal immigrants and thus difficult to find), *aff'd*, 267 F.3d 743 (7th Cir. 2001).

21. See David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 923-31 (1998) (arguing that the main purpose of small claims class actions is deterrence).

22. This is with the caveat that the amounts meted out in settlement should reflect the value of the claim at litigation. See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 566 (1991) (showing that in many securities litigation settlements the amounts paid out cohere to a "going rate" of settlement rather than an amount reflecting the strength of plaintiffs' claims).

regulatory device of the class action attempts to achieve deterrence through individual compensation. Whether this device is effective in achieving these linked goals—and whether they need to be linked at all—is an open question.²³

One might ask why we should care about class action governance at all. Scholars viewing class actions from an economic perspective generally view the central problem in class actions to be an agent-principal problem, and have a correspondingly narrow view of the governance regime required to resolve it.²⁴ Other scholars assume that participation values have a place in class actions, but without providing the conceptual underpinning for this assumption beyond the representation requirement in Rule 23.²⁵ The due process requirements of notice, hearing, and opportunity to opt out in 23(b)(3) class actions, combined with the Rule 23(a)(4) representation requirements,²⁶ indicate that the rule makers saw some autonomy value for individual claimants in class action litigation, but the strength of that value is uncertain and the reasons for it are not clarified in the case law.²⁷ The smaller the individual claim at issue, as in consumer class

23. Arguably the smaller the individual claim the lower the autonomy value associated with that claim. See, e.g., *Gammon v. GC Servs. Ltd. P'ship*, 162 F.R.D. 313, 321-22 (N.D. Ill. 1995) (holding that *cy pres* distribution of damage award is appropriate where class of four million had claim valued at thirteen cents each). In such cases, the compensation goal may be a barrier to extracting the correct amount from the defendant and thus a barrier to deterrence.

24. The underlying assumption of economic analysis of this type appears to be that compensation is the central goal of consumer class actions. See, e.g., John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986) [hereinafter Coffee, *Understanding the Plaintiff's Attorney*]; Macey & Miller, *supra* note 7. See also Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 374 (1996) (describing how economic analysis of litigation has been based on the agent-principal problem).

25. See, e.g., Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 25 (1996) (criticizing the self-selected representative in class actions as an "anomalous" form of governance); Shapiro, *supra* note 21, at 958-59 (advocating for fuller representation of class members as a group).

26. Federal Rule of Civil Procedure 23(a)(4) requires that the class be "adequately" represented in order to be certified as a class.

27. For an enlightening discussion on the basis for and critique of this individual choice rationale, see Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992). See also Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571 (1997) (arguing that due process requires notice, the right to be heard, and opt out in the class action context and that these are inadequately met under the current regime). Autonomy values, the traditional justification for due process protections and good governance, are less powerful in this context. See Frank Michelman, *Formal and Associational Aims in Procedural Due Process*, DUE PROCESS: NOMOS XVIII 126-28, 154 n.4 (J. Pennock & J. Chapman eds., 1977) ("[R]espect for individual dignity, autonomy, and self-expression demands that those with rights directly at risk have adequate means of registering their concerns."). Since the claim is small, some might argue, as long as there are mechanisms to avoid fraud or self-dealing

actions, the more limited the autonomy values that can be placed on that individual claim.

Despite small individual recoveries, the internal governance of small claims class actions deserves attention.²⁸ Both the regulatory function of the class action mechanism and the deterrence justification are promoted by a robust governance regime. Furthermore, a strong governance regime will benefit class members by increasing agent monitoring to prevent exploitation. Good governance will improve outcomes in class actions by multiplying the sources of protection against agency problems and by giving advocates of alternative solutions an opportunity to be heard.²⁹ Furthermore, because consumer class actions seek to

in payouts, the internal governance structure does not matter because the small size of the claims renders autonomy values relatively weak. But autonomy values are not the only values for support of participatory governance. Viewed collectively, the size of these cases is significant. Communitarian values may be a more fitting place to look for class action governance. *Cf.* MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 173-74, 183 (contrasting "liberalism" with a "constitutive conception of community"). Although it is difficult to describe the consumer class as a "community" in the way that community is typically defined in political science literature, it nevertheless is possible to see the consumer class as a group with a public-oriented interest beyond their individual interest in compensation. *Cf.* Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 445 (1989) (comparing liberal, individually oriented conceptions with the republican conception of an autonomous public interest).

28. The reasons for the importance of the internal governance structure of class settlements presented here are admittedly incomplete. I hope to develop a more rigorous analysis of the organizational theory of the class action and to explore more fully the extent to which norms other than litigant autonomy can serve as a basis for a robust governance regime in the future.

29. Some alternative options include the use of *cy pres* funds in addition to or instead of compensation directly to class members. *See* 3 NEWBERG ON CLASS ACTIONS § 10:17 (4th ed. 2003) (describing use of *cy pres* distributions of class damages); Kerry Barnett, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 YALE L. J. 1591 (1987). Other alternatives may be the provision of repairs or retrofitting. *See In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 1995 U.S. Dist. Lexis 3507 (E.D. La. Mar. 15, 1995) (noting objector suggestion that retrofitting would significantly improve stability and safety of vehicle at issue in litigation). Although there is no empirical evidence that good governance, or that this governance proposal in particular, will yield better substantive results to class action suits, what seems clear is that the current system of attorney control does not yield excellent substantive results. Furthermore, vociferous criticism of plaintiffs' side class action attorneys indicates the current system of governance has been difficult to justify on a results basis. This utilitarian argument has been one basis for liberal political philosophy. *See* JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 56 (Richard H. Cox, ed. 1985).

[A]s if when men quitting a state of nature entered into society, they agreed that all of them but one should be under the restraints of laws, but that he should still retain all the liberty of the state of nature, increased with power, and made licentious with impunity. This is to think that men are so foolish that they take care to avoid what mischiefs may be done to them by *polecats* or *foxes*, but are content, nay think it safety, to be devoured

deter wrongdoing, they are a public good. Thus, the inclusion of deliberative process, accountability and responsiveness, to claimants and the public, in class action governance is justified for the same reasons notice and comment provisions are integral to administrative and regulatory law.³⁰ Finally, good governance would give class action architects greater public legitimacy because they can point to a process that resembles other legitimate processes for reaching decisions in our society, in contrast to the current regime that increases the perception that attorneys are exploiting class actions unchecked.³¹

In pursuit of this goal, this Article looks at the class as a group in need of governance and proposes a comprehensive set of principles through which to judge the efficacy of class action mechanisms. This Article focuses on governance in the settlement phase because it is one of the most contentious moments in class action litigation. Part I illustrates the problems in the current regime of class action governance for small claims class actions. Part II analyzes and critiques three solutions to these problems that have been proposed over the last twenty years: market mechanisms, democracy-based solutions, and judicial administration. Part III proposes a comprehensive model of governance based on four fundamental principles: mandatory disclosure, an actively adversarial process, expertise, and independence of decision-making.

by lions.

Id.

30. The Administrative Procedure Act, for example, provides for notice and comment on rules and thus indicates support for participation values in the administrative state. *See also* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764-65 (1969) (opining public participation in administrative rulemaking proceedings ensures that regulation is responsive to the needs of those regulated). Both the defendants, who are represented directly in the proceedings, and class members, have concrete interests in the outcomes and distributive effects of class actions. The public has a more attenuated interest in these outcomes. In some circles, scholars are cynical about the relationship between administrative and regulatory agencies and notions of popular sovereignty. Although there is insufficient room to develop this issue further, there is significant work to be done on the relationship between democratic values in regulatory litigation and the regulatory state.

31. The pervasive criticisms against class actions—which fall mostly in the lap of plaintiffs' side class action attorneys—are damaging to the legal profession and to the regulatory purpose of the class action mechanisms. Commentators who oppose class action litigation often point to lawyer control as the reason for eliminating class actions. *See, e.g.*, WALTER OLSON, *THE RULE OF LAWYERS: HOW THE NEW LITIGATION ELITE THREATENS AMERICA'S RULE OF LAW* (2003). Studies and opinion polls have found that the public believes that lawyers are greedier and more dishonest than other professionals. *See* Lynn A. Baker & Charles Silver, *Introduction: Civil Justice Fact and Fiction*, 80 TEX. L. REV. 1537, 1539 (2002) (describing studies). The bad press concerning class action litigation has not helped this image. Good governance will lend legitimacy to the class action process and by extension to the legal profession charged with overseeing these cases.

I. PROBLEMS IN CLASS ACTION GOVERNANCE

A. *A Misapplication of the Traditional Adjudication Model*

Class action governance problems are rooted in the misapplication of the traditional model of adjudication to the group context. While it may seem obvious that a class action is more than simply a suit with multiple complainants, such has been the power of the traditional model of adjudication that very few procedural mechanisms were deemed necessary to ensure fair and efficient class governance.³² In reality, the contrast between the traditional model and class action litigation is sharp.

In the traditional model of adjudication, the client is a voluntary and active participant in the lawsuit, dictating its course.³³ The attorney is bound by specific, enforceable ethical duties to zealously advocate on behalf of the client's interests, to keep the client informed, and to consult the client at every critical juncture in the litigation. The client's leverage over his agent is ensured by his power to hire or fire the attorney at will. Finally, the judge is a neutral arbitrator of the dispute.³⁴

Class actions set the traditional model of adjudication on its head.³⁵ The class action effectively herds absentee plaintiffs into a lawsuit without their consent and often without their knowledge in part because the right to opt out is illusory. Class counsel fills the resulting power vacuum by proposing the parameters of the class, recruiting named representatives, and making every

32. Class members are protected by a determination that the representation is adequate, notice, a hearing, and the opportunity to opt out. See FED. R. CIV. P. 23. On the history of the development of Rule 23, see HENSLER ET AL., *supra* note 2, at 9-37.

33. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976) (characterizing the traditional model of civil litigation as having the following defining features: (i) it is bipolar, (ii) litigation is retrospective, (iii) right and remedy are interdependent, (iv) the lawsuit is a self-contained episode, (v) the process is party initiated and party controlled). This traditional model is an ideal type even when applied to individual litigation, but has powerful resonance that has been particularly damaging in the class action context. See generally Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978) (basing legitimacy of adjudication on highly individualized participation).

34. See generally Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975) (discussing the role of the judge in the search for truth).

35. See Samuel Issacharoff, *Preclusion, Due Process and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1058 (2002) ("A class action is simply, when all else is stripped away, a state-created procedural device for extinguishing claims of individuals held at quite a distance from the 'day in court' ideal of Anglo-American jurisprudence."). Some scholars have made proposals from the point of view that the role of class action governance is to aggregate individual preferences with a strong tilt towards autonomy values. See, e.g., Coffee, *Accountability*, *supra* note 3, at 379-80 (criticizing the "entity theory" as "a legal fiction" that "provides a justification for the attorney making judgments in the 'best interests' of the class and allocations among class members in precisely the manner *Amchem* seemed to forbid").

important decision, including whether to accept or reject proposed settlements.³⁶ Class counsel are not required to attempt to identify or build majority support for a settlement or survey class members to determine their interests. Far from being a neutral or disinterested arbiter, the judge must often assume an active role in facilitating settlement, in the process becoming interested in its approval.³⁷

Despite these differences, few procedural modifications have been made to the class action litigation process to accommodate the collective nature of class action litigation. Instead of dictating the course of the suit, class members' interests are pursued by a self-appointed or court-appointed "governor" who decides what is in their best interest, often without input from his clients. As Owen Fiss points out, "self-appointment is an anomalous form of representation, only justified, if at all, by the most exceptional circumstances."³⁸ This form of government resolves the problem of organizing a group into a "client" by reducing the group to a few representatives of dubious legitimacy. The results have been occasional instances of egregious corruption on the part of attorneys who take advantage of class members³⁹ and a perception that consumer class actions are not a public good, but a money making scheme for unscrupulous lawyers.

B. The Simultaneous Expansion and Disintegration of the Class Action

Two forces work to expand the numbers of claimants included in class actions. First, preclusion rules, anti-suit injunctions, and removal statutes

36. Coffee, for example, likens class counsel to a joint-venturer with the class, who has a financial stake in the outcome of the litigation because of the considerable investment a class action requires. He argues that the "leading cause of 'cheap settlements' may not be collusion between class counsel and defendants . . . but rather a basic differential in the level of risk aversion" because class counsel, with its significant financial investment in the action, is more likely to be risk averse than the class. Coffee, *Accountability*, *supra* note 3, at 390-93. See also *In re Cendant Corp. Litig.*, 264 F.3d 201, 254-55 (3d Cir. 2001) (explaining that "[b]ecause of this conflict (and because 'the class' cannot counteract its effects via counsel selection, retention, and monitoring), an agent must be located to oversee the relationship between the class and their lawyers. Traditionally, that agent has been the court."). While not quite collusion, this perverse incentive does look like a type of self-dealing.

37. Owen Fiss discussed this phenomenon in the context of what he perceived to be the bureaucratization of the judiciary, predicting that where the judge serves "as both architect and structural engineer" of an institution (and, analogously, a settlement), he is likely to view challenges to that institution as personal challenges. Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121, 126 (1982).

38. See Fiss, *supra* note 25, at 25.

39. See generally Koniak & Cohen, *supra* note 9, at 1058-69 (describing litigation in which class members who received no benefit had attorneys fees deducted from their escrow accounts); Wolfman & Morrison, *supra* note 5, at 473-77 (describing coupon settlements that did not benefit classes).

encourage the consolidation of rival actions in a single forum.⁴⁰ Second, class counsel has incentives to settle the most comprehensive action first, because only one action, if any, will ultimately stand. Defendants play rival class counsel against each other to settle for the lowest price, a process referred to as a reverse auction.⁴¹ The phenomenon of reverse auctions, or the threat of reverse auctions, pushes class counsel towards sub-optimal settlements and more global settlements to ensure their own compensation.⁴² Enterprising counsel may try to bolster their settlement potential by buying out competitors.⁴³ When competing attorneys know that they will be precluded by a settlement, a buy-out is an attractive alternative.

The trend towards the expansion of small claims class actions over an ever-increasing number of geographically widespread claims renders the internal governance structure of class actions even more important.⁴⁴ The proposed Class Action Fairness Act sought to further expand this trend by granting federal diversity jurisdiction to state law-based small claims class actions.⁴⁵ Multi-District Litigation panels consolidate multiple class actions to a single district for discovery and settlement purposes.⁴⁶ The right to collateral attack has been limited so that settlement in one forum will extinguish claims in other fora, even claims that could not have been brought in the settling forum.⁴⁷ Settling parties

40. This in part because rival attorneys know *ex ante* that these procedural tools will be used against them.

41. See John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370 (1995) (describing the reverse auction phenomenon as “a jurisdictional competition among different teams of plaintiffs’ attorneys in different actions that involve the same underlying allegations”).

42. See Coffee, *Accountability*, *supra* note 3, at 390-93 (discussing risk aversion of class counsel).

43. For example, in the Bausch & Lomb class action discussed in HENSLER ET AL., *supra* note 2, at 158, tag along class actions were settled for undisclosed, but reportedly nominal amounts.

44. The numbers of nationwide class actions are reportedly rising. See *id.* at 64-66. There also is a countervailing trend towards localization of class actions. See, e.g., *R.J. Reynolds Tobacco Co. v. Engle*, 649 So.2d 245 (Fla. Dist. Ct. App. 1996) (denying certification of nationwide class and approving certification of class of Florida citizens in tobacco class action).

45. See, e.g., Class Action Fairness Act of 2003, S.274, 108th Cong. § 4 (2003) (among other things, proposing amendment to 28 U.S.C.A. § 1332 (West 2003) permitting original jurisdiction of class action where the amount of the entire controversy exceeds two million dollars). Such an amendment would abrogate *Snyder v. Harris*, 394 U.S. 332 (1969) and *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

46. See 28 U.S.C. § 1407 (West 2003).

47. See *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996) (holding that the Full Faith and Credit Act requires federal courts to give preclusive effect to state judgments even when state court judgment at issue incorporates class action settlement releasing claims solely within jurisdiction of federal courts, so long as they comply with due process). Subsequently, on remand the 9th Circuit held that the Supreme Court’s decision determined that the state court judgment comported with due process. See *Epstein v. Matsushita Elec. Indus. Co.*, 179 F.3d 641 (9th Cir.),

can obtain an anti-suit injunction preventing class members from bringing suits in any other forum.⁴⁸ Or, they may seek a determination that a rival action is barred in the forum where a competing suit was filed.⁴⁹

For example, in the *Mexico Money Transfer Litigation*,⁵⁰ a nationwide consumer class action arising out of allegations that money transfer companies overcharged customers by manipulating the exchange rate, a total of eight lawsuits were initially filed.⁵¹ Most of these were dismissed, dropped or stayed by the federal court in the Northern District of Illinois that ultimately decided the case.⁵² After this consolidation, National Class Counsel, consisting of the attorneys who had filed class actions in Texas and Illinois, negotiated with the defendants.⁵³ This process eliminated potential objections *ex ante*.⁵⁴

cert. denied, 120 S. Ct. 497 (1999).

It is now settled that a judgment pursuant to a class settlement can bar later claims based on the allegations underlying the claims in the settled class action. This is true even though the precluded claim was not presented, and could not have been presented, in the class action itself.

In re Prudential Ins. Co. of Am. Sales Practice Litig., 261 F.3d 355, 366 (3rd Cir. 2000). See also Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765 (1998) (criticizing the right to collaterally attack a settlement for inadequacy of representation as excessively broad). The right to collateral attack in state court appears to be expanding somewhat. See *State v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. 2003).

48. See Monaghan, *supra* note 6, at 1150, 1151-52 n.13. (discussing *Baker v. General Motors' Corp.*, 118 S. Ct. 657, 665 (1998), which distinguished between enforcement and preclusive effects of antisuit injunctions). As Monaghan points out, the nature of the relationship between the enjoining court and the enjoined court has yet to be worked out.

49. See *Syngenta Crop Prot. Inc. v. Henson*, 123 S. Ct. 366, 379 n.1 (2002).

50. 164 F. Supp. 2d 1002 (N.D. Ill. 2000), *aff'd*, 267 F.3d 743 (7th Cir. 2001), *cert. denied*, *Garcia v. W. Union Fin. Servs., Inc.*, 535 U.S. 1018 (2002).

51. In *In re Mexico Money Transfer Litigation*, two suits were filed in federal court in California. After the federal claims of the initial suits were dismissed, these were refiled in California state court on behalf of a California class with solely California state claims. A third federal suit was filed in California federal court naming a nationwide class. Two class actions were filed in federal court in the Northern District of Illinois. These were subsequently consolidated. Two class actions were filed in federal court in Texas on behalf of a Texas class. Another class action was filed in Texas state court also on behalf of a Texas class. See 164 F. Supp. 2d at 1008-09.

52. *Id.*

53. 164 F. Supp. 2d at 1010. The district court noted that the parties' declarations in support of settlement described a year-long, arms-length negotiation and that attorney's fees were only negotiated after a preliminary settlement had been reached.

54. The objectors who were represented by counsel consisted of California class members who alleged that they would have stronger claims under California law. The remaining objectors were not represented by counsel. While it is still possible for the remaining class members to object, many potential committed objectors will opt out.

Concurrent with the expansion of class actions is a disintegration of the courts' power to consolidate and control them. This is a federalism issue as well as one of manageability. Blatant forum shopping is rife in class actions. Class counsel will file national actions in state court in order to gain the leverage of hospitable state courts. Both class counsel and defendants will push class actions towards state court to obtain settlement approval.⁵⁵ A settlement rejected in federal court on fairness grounds may be re-filed in state court and approved there.⁵⁶ Both class counsel and defendants will pull towards federal court when they believe they can gain more leverage or obtain global settlement in that forum. Objectors and rival class counsel can also use procedural rules to their advantage.⁵⁷ Even when a state suit disrupts the settlement already reached and approved in federal court, it is up to the state court to determine whether or not the suit is barred. Collateral attacks in state courts on personal jurisdiction grounds based on denial of due process protections are also gaining momentum.⁵⁸ All the while, the courts work to prevent the multiplication of class actions to conserve the efficiency of the class action mechanism and judicial resources. A viable governance regime for class actions must recognize the prevalence of forum shopping and the corollary phenomena of buy-outs of competition by class counsel and defendants.

C. Barriers to Participation

Significant systemic barriers block direct class member participation in class actions. Under the current governance regime, class members have a minimal role in the litigation.⁵⁹ Class counsel's role as entrepreneur encourages counsel

55. The reasons for state court's apparent deference to settlements are not clear, but anecdotal evidence suggests that this is the case.

56. For example, when the Third Circuit overturned a somewhat notorious settlement in the *In re General Motors Pick-Up Truck Fuel Tank Products Liability Litigation*, the parties re-filed the settlement in Louisiana state court, where it was approved. 134 F.3d 133 (3d Cir. 1998). See Public Citizen Litigation Group, *Public Citizen's Involvement in Class Action Settlements* (Feb. 28, 2002) at http://www.citizen.org/litigation/briefs/Class_Action/articles.cfm?ID=552.

57. For example, rival attorneys or objectors can turn to state courts and the All Writs Act cannot furnish removal jurisdiction where a federal court has no original jurisdiction. See *Syngenta Crop Prot. Inc. v. Henson*, 537 U.S. 28 (2002). In *Syngenta*, a suit was settled in a consolidated federal court proceeding with plaintiff's counsel participating. That same counsel then brought a competing class action in state court and argued that the settlement did not preclude the subsequent state court action. The Supreme Court held that the state court would decide whether or not the subsequently filed state court action violated the federal court settlement. *Id.*

58. See *State v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. 2003) (holding that class action settlement did not preclude suit by Vermont residents because Alabama court lacked personal jurisdiction due to defects in due process protections).

59. Although class members have a formal right to participate in the class action, participation is difficult and costly. Structural barriers prevent class members from exercising their right to participate, particularly in the absence of attorney representation.

to keep information from the class in order to retain full control of the negotiation and settlement process. Communication with far-flung class members is expensive, and will likely lead to the discovery of class member preferences or internal class conflicts that class counsel would rather ignore. Were there a requirement that class counsel solicit class member views, or that a certain percentage of the class "opt-in" to the class action by submitting claims, this relationship would change dramatically.

Class members are not repeat players and they cannot create ongoing relationships with class counsel, therefore they lack leverage over their attorney. Because there is no ongoing relationship, even the type of leverage that a consumer has over a manufacturer is lost in the class action context. In a commercial enterprise, a consumer's decision not to buy a product has a direct effect on the bottom line, even if a small one. In the class action context, opt outs will not affect attorney remuneration unless they are so massive as to scuttle the entire settlement. Because of the ongoing relationship between consumers and manufacturers, a decline in services or the product in the commercial enterprise may activate a consumer response to alert the firm to the problem and lead to recovery.⁶⁰ There is no such ongoing relationship in the class action.

Structural realities and perverse incentives inhibit participation to an even greater extent in settlement classes. The first notice the class receives of the litigation is also a notice of settlement. If they are dissatisfied with the settlement, they may opt out or protest the settlement in the fairness hearing. The hearing is usually a non-adversarial proceeding because both parties' attorneys want approval of the settlement they have worked hard to formulate.⁶¹ Worse yet, the client—that is, the class—exists at the whim of the defendant because the

60. See ALBERT HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES 15 (1970). In order for exit to be an effective means of communicating consumer dissatisfaction, enough individuals must defect to another firm in order to affect the company's bottom line. But unless the company is vigilant, which a firm in decline is unlikely to be, by the time the company understands consumer dissatisfaction, the decline may already be too far underway for correction.

For competition (exit) to work as a mechanism of recuperation from performance lapses, it is generally best for a firm to have a mixture of alert and inert customers. The alert customers provide the firm with a feedback mechanism which starts the effort at recuperation while the inert customers provide it with the time and dollar cushion needed for this effort to come to fruition.

Id. at 24. Several prominent class action scholars have discussed the problems of class action governance using Hirschman's work as a guide or inspiration. See Coffee, *Accountability*, *supra* note 3, at 376 n.17 (using the corporate governance paradigm of "exit, voice, loyalty" but asserting no intent to adopt specific conclusions from Hirschman's work); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 367 (1999).

61. The fairness hearing is non-adversarial where there are no objectors. Where there are objectors represented by sophisticated counsel, the objectors may bring an adversarial aspect into the proceeding.

court has not certified the class action.⁶² Where a certified class is expanded during settlement negotiations, usually to assist defendants in obtaining global peace, the same problem arises.⁶³ Thus, even a settlement reached subsequent to certification may have a “settlement class”—a number of people whose first connection to the class action is through settlement and whose claims did not go through the certification process.⁶⁴

Those due process protections that seem on their surface to encourage some class member participation have proven ineffective. The fundamental due process requirements for 23(b)(3) class actions are notice, the right to be heard, and the right to opt out.⁶⁵ Opt out, or exit, is an ineffective means of realizing participation values because small claims class members cannot bring independent claims. Notices are difficult for ordinary people to understand and hearings are non-adversarial and, therefore, fail to address inequities in settlements. The structure of notices and fairness hearings does not facilitate the possibility of persuasive objectors who are able to point out the inadequacy of settlements.

The means by which a class member may exit a class action is by opting out of the class either at the certification or settlement stage.⁶⁶ The central argument

62. See Issacharoff, *supra* note 60, at 348 (discussing court’s treatment of settlement classes in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and arguing that even though Supreme Court in *Amchem* warned against the evils of settling without reference to testing of claims in the adversarial process, that is just what settlement classes are). Because no certification motion has been approved in a settlement class, if defendants pull out of the settlement then the class will cease to exist. In that case, class counsel will have to litigate a difficult and costly certification motion.

63. See HENSLER ET AL., *supra* note 2, at 157-58 (discussing the expansion of the class after settlement in the Bausch & Lomb contact lens pricing litigation). That RAND study notes the expansion of class parameters in several of the case studies.

64. To the extent that we believe that the expansion of the class for settlement purposes does not raise notice problems, it is because we do not believe that the initial notice itself was particularly effective.

65. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (holding that for personal jurisdiction over absent class members, due process requires notice, the opportunity to be heard, and the opportunity to opt out); see also Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571 (1997) (arguing that due process requires notice, the right to be heard, and the right to opt out in the class action context and that these are inadequately met under the current regime); Monaghan, *supra* note 6, at 1166 (discussing due process requirements under *Shutts*).

66. See Fed. R. Civ. P. 23(c)(2)(B) (requiring “the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort” and requiring that this notice be in “plain, easily understood language” and include “the nature of the action, the definition of the class certified, the class claims, issues, or defenses, that a class member may enter an appearance through counsel if the member so desires, that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and the binding effect of the class judgment on class members under Rule 23(c)(3)”). Opt outs are not required in limited fund class actions brought under Rule 23(b)(1) or

in favor of opt outs is that they permit the realization of individual choice.⁶⁷ Courts understand opt outs as a pure expression of claimant autonomy, one that cannot be collectivized.⁶⁸ The autonomy rationale for opt outs assumes that claimants make knowing and intelligent decisions to opt out or stay in the class action, which we know is often not the case in small claims class actions. Individual opt outs make the most sense where a claimant does not want to be part of a lawsuit in the first place and/or has a positive value claim that can be brought independently, because opt outs place the claimant in the same position she would have been in absent the class action mechanism.⁶⁹

Exit is not a viable means of realizing autonomy in a non-competitive space, however, because practically speaking, opting out simply removes that class member from the debate. Opt outs are not viable solutions to an inadequate settlement because once a class member has opted out, he or she no longer has standing to participate in the class action.⁷⁰ The opt out, as an expression of autonomy, could be valuable where there is a realistic alternative to the settlement; otherwise, the right to opt out is a mere formality.⁷¹ A class member who has opted out of a small claims class action will not be able to file a claim on her own. From the perspective of that class member, the right to opt out is meaningless because there is nowhere to opt out *to*.

Theoretically, massive opt outs might be an effective means of communicating client dissatisfaction since courts consider not opting out to be

injunctive class actions brought under Rule 23(b)(2).

67. See Coffee, *Accountability*, *supra* note 3, at 418 (arguing that exit through opt outs maximizes individual choice).

68. "The right to participate, or to opt out, is an individual one and should not be made by the class representative or the class counsel." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1024 (9th Cir. 1998). *Hanlon* argued that the right to opt out must be an individual right not only for due process concerns of the individual class members "who have the right to intelligently and individually choose whether to continue in a suit as class members," *id.*, but also because any other rule "would lead to chaos in the management of class actions." *Id.* (quoting *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 412 (2d Cir. 1975)). Collective opt outs, which have been rejected by courts, make more sense where the choice of law renders one group of claimants more valuable than others.

69. But see Rubenstein, *supra* note 14, at 1648-49 (arguing that the class device is inadequate because a litigant cannot get a case un-filed, and the opportunity to participate in remedy not useful for one who does not want the case at all). There is a possibility, albeit unlikely, that a class of opt outs could seek certification and mount a rival class action, and that the courts might harness such potential rivalries to yield more fair results. John Coffee proposes mechanisms for encouraging such competition. His solution is discussed *infra* pp. 32-33.

70. See *Mayfield v. Barr*, 985 F.2d 1090, 1093 (D.C. Cir. 1993) (finding that class members who have opted out of a damages class action have no standing to object to a subsequent class settlement because by opting out they "escape[] the binding effect of the class settlement").

71. See, e.g., Coffee, *Accountability*, *supra* note 3, at 378 (discussing small claims class action where "right to exit will mean little" in contrast to the mass tort or large claims case where right is critical because at least some claimants hold high value claims).

tacit consent.⁷² A near-total opt out would be something like a boycott of the settlement and would make possible a second, perhaps better, class action on behalf of opt outs. But in a world where numerous objections have not been sufficient to spur courts to reject settlements, a campaign of opt outs is not likely to be effective.⁷³ Courts may read massive opt outs as a protest, or may see them as an exercise in client autonomy that legitimates acceptance of the offending settlement for the remaining class members. This creates a double-bind for class members, who lack standing to intervene in the fairness hearing if they have opted out and are trapped in the settlement they disapprove of if they stay in, object, and lose. Even under the revised rule, which permits opt outs at settlement, the timing of the opt out is such that class members must choose whether to opt out before the fairness hearing.⁷⁴ Courts have rejected opt out attempts to appeal settlements for lack of standing, perhaps because courts sympathize with class counsel's arguments that attorneys representing opt outs are attempting to hijack the intervention process to obtain leverage over class counsel and defendants in order to procure a better settlement for the claimants who opted out.⁷⁵

One may ask why we should be concerned about the exclusion of dissatisfied class members with small value claims. Some argue that we should not because absent the class action collectivization mechanism, these dissenters would have no recourse at all,⁷⁶ and therefore any recovery is a windfall for them. There are several responses to this view. First, because some dissatisfied class members

72. See, e.g., *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1314 n.15 (3d Cir. 1993) (noting that "silence constitutes tacit consent," but recognizing that this assumption may, as a practical matter, understate potential objectors); *In re GNC S'holder Litig.*, 668 F. Supp. 450, 451 (W.D. Pa. 1987) (noting that "[i]n the class action context, silence may be construed as assent").

73. See, e.g., *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 174-75 (5th Cir. 1983) (approving settlement over objections of twenty-three of twenty-seven named plaintiffs and forty percent of class); *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456 (2d Cir. 1982) (approving settlement over objections of approximately fifty-six percent of class); *Cotton v. Hinton*, 559 F.2d 1326, 1333-34 (5th Cir. 1977) (approving settlement despite objections of counsel purporting to represent nearly fifty percent of class); *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3d Cir.) (approving settlement despite objections of twenty percent of the class), *cert. denied*, 419 U.S. 900 (1974). But see *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 217-18 (5th Cir. 1981) (recognizing that "a low level of vociferous objection is not necessarily synonymous with jubilant support"); *Pettway v. Am. Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978) (overturning approval of settlement where seventy percent of class objected).

74. See FED. R. CIV. P. 23(e)(3) ("[T]he court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.").

75. See, e.g., *In re Brand Name Prescription Drugs Antitrust Litig.*, 115 F.3d 456 (7th Cir. 1997) (barring organized opt outs from appealing settlement).

76. For example, Monaghan approves of the result in "situations where the absent plaintiffs lack independently viable claims and stand only to 'win' by the lawsuit." Monaghan, *supra* note 6, at 1169.

opt out for good reasons, the argument for ignoring opt outs is in effect an argument against the policy of vindicating and deterring small wrongs through class actions. The “windfall” argument also ignores the regulatory function of class action suits. Because legislatures have made consumer protection through lawsuits a staple of our political landscape, it is important that these suits produce fair results, whether that means individual compensation or deterrence. The deterrence value of small claims class actions further requires that the system ensure that the amount extracted from defendants is appropriate.⁷⁷ The deterrence value alone cannot determine distribution of the fund, however. There may be better justifications for excluding dissenters from decisions about how settlement funds are distributed, because they do not have a stake in that distribution.⁷⁸ On the other hand, dissenters will often be those who are most aware of the inequities of the distribution scheme developed by the attorneys, and their input will benefit class members who do stand to gain from the fund. In the context where the state has successfully consolidated claims through the class action mechanism in the hands of class counsel, dissenting voices become more important as indicators of a failure of process because competition is not a viable outlet for dissent.⁷⁹

The two other procedural protections meant to create some limited class member participation, notice, and hearing, are also inadequate as currently enforced. As a form of communication with informational intermediaries and monitors, such as objectors’ attorneys and judges, notices provide insufficient information. As a form of communication with class members, notices are difficult to understand and therefore ineffective. The types of notice used in most class actions indicate that courts rarely take the notice requirement seriously. Notices are generally written in a form of legalese that is difficult, if not impossible, for the ordinary claimant to understand.⁸⁰ Some are even

77. See generally Alexander, *supra* note 22 (arguing in favor of settlements that reflect outcomes at trial rather than the “going rate” of settlement in securities context).

78. This argument does not apply to claimants who stand to benefit from the fund. The only justification to exclude small claims class members from participating in such distribution decisions is that this type of input is too expensive or inconvenient to obtain.

79. Sometimes class members opt out because they oppose the action altogether as harmful to the interests of the class as a whole. In that case, opting out will not help them because they cannot get their case “un-filed” by opting out. See Rubenstein, *supra* note 14, at 1648-49 (noting that the class action device is an inadequate solution to the problem of the limits of individual autonomy in the group litigation context because class members cannot get a case “un-filed” and the opportunity to participate is not a useful remedy where plaintiffs do not want the lawsuit brought in the first place). See, e.g., *In re Matzo Food Prods. Litig.*, 156 F.R.D. 600, 608 (D. N.J. 1994) (rejecting settlement and noting that plaintiffs who have business relationships with defendant may be reticent to bring claim against defendant).

80. “It is beyond the experience or expectation of reasonable citizens that the failure to respond to what looks like a slightly unusual piece of junk mail constitutes assent to the solicitation . . .” Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV.

inaccessible to a reader trained as an attorney.⁸¹ Even the notice requirements of the revised Rule 23(c), which provide some specific disclosures, are insufficient.⁸² Rule 23 does not require notices to include the amount an individual class member will receive or the amount of attorneys' fees.⁸³

Fairness hearings are equally flawed. They are often too short to achieve the goal of genuine debate over the merits of the settlement.⁸⁴ The timing of filings further limits the usefulness of fairness hearings. Objectors are often required to file their opposition motions *before* class counsel and defendants file their motions in support of settlement.⁸⁵ This timing, combined with the limits on objector discovery, leaves objectors at a disadvantage because they must develop their objections without the information possessed by class counsel and defendants.⁸⁶ Such hearings provide little opportunity for meaningful objection and allow class counsel and defendants to push their settlement through without

461, 467-68 (1997).

81. See, e.g., *Kamilewics v. Bank of Boston Corp.*, 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., dissenting) ("The notice not only didn't alert the absent class members to the impending loss but also pulled the wool over the state judge's eyes.")

82. See Fed. R. Civ. P. 23(c)(2)(B) (requiring that notices to class members in 23(b)(3) class actions provide the following information in "plain, easily understood language": (1) nature of the action, (2) the definition of the class certified, (3) the class claims, issues or defenses, (4) that a class member may enter an appearance through counsel, (5) that any class member may request exclusion from the class, (6) the binding effect of the class judgment).

83. See HENSLER ET AL., *supra* note 2, at 451-53. There is some movement towards more rigorous notice requirements. See *State v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. 2003) (finding lack of personal jurisdiction over Vermont plaintiffs in part because notice was substantively inadequate); *infra* note 270 (citing cases holding that disclosure of attorneys fees is a required part of class notice).

84. See, e.g., *Wolfman & Morrison*, *supra* note 5, at 489 (describing the Mustang convertible coupon settlement where objectors obtained no information prior to the fairness hearing and the judge approved settlement after a thirty minute hearing with no evidentiary support in favor of the settlement presented).

85. See *id.* at 480-90 (discussing the difficulties of obtaining information as objectors); see also Brief of Amicus Curiae Public Citizen in *In re Prudential Ins. Co. of Am. Sales Practices Litig. Agent Actions*, No. 99-5960 (3d Cir.), available at http://www.citizen.org/litigation/briefs/Class_Action/articles.cfm?ID=693 (detailed discussion of legal and practical difficulties faced by settlement objectors).

86. Potential objectors are kept out of the negotiation process and are permitted very limited discovery. Courts have barred objectors from cross-examining fairness experts and from obtaining discovery of side-settlements. See, e.g., *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1186 (10th Cir. 2002) (affirming settlement and holding that hearing did not violate due process where objectors were forbidden from cross examining parties' fairness expert, not permitted to present live testimony, and not permitted to present rebuttal affidavits); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1 (1st Cir. 1999) (denying objectors discovery of side-settlement). The revised Rule 23(e)(2) requires parties to file a statement identifying side deals but not the substance of those deals.

debate.

In their Rule 23(e) review of settlements for procedural fairness, courts will generally look to whether “(1) the negotiations occurred at arms length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.”⁸⁷ All but one of these criteria are fundamentally flawed. First, even parties engaging in arms-length negotiations can face incentives that lead them to self-serving settlements that do not adequately compensate the class. This is especially true where the “client” cannot monitor the attorney’s actions. Second, in evaluating discovery, courts only look at discovery as between defendant’s and plaintiff’s counsel. Discovery is only sufficient if both class counsel *and* objectors have an adequate opportunity to obtain material information. Third, the absence of objectors has no necessary relationship to the fairness of a settlement. Few objectors can mean that there is little to object to because the settlement is fair. But it can also mean that class members lacked sufficient opportunity to object. For example, there may be few objections because notices were too confusing, class members had insufficient information, or class members were not given an adequate opportunity to voice their objections. In addition, objections may be limited because even though a settlement is unfair, class members have made the cost-benefit calculation that their potential individual recovery is too small to merit involvement. Other types of objectors, such as public interest groups or state attorneys general, may not object to unfair settlements because they did not know of the settlement or lacked the resources to intervene. Because the costs of objecting will exceed the value of any individual claim, unscrupulous class counsel can take advantage of the same type of collective action problem that was to be remedied by the class action device in the first place. Only the experience of the attorney in similar litigation (essentially a measure of quality of leadership), is a good procedural measure. Even this measure is problematic, however, because a self-dealing counsel may have substantial experience in similar litigation, but not have reached adequate results for her clients.

Compounding the flaws in these procedural requirements is the problem of ascertaining class member preferences. The structure of Rule 23 implies that class member preferences can be ascertained through the attorney-class relationship or, as a last resort, at a fairness hearing, but these provisions are inadequate to the task. There are numerous practical barriers to ascertaining class member preferences. Reaching out to class members takes attorney time and money. Voting, for example, would exponentially increase the costs associated with notice as each additional communication means substantial additional expense. Community meetings are also difficult to organize when class members are geographically disbursed. Even effective mechanisms might not guarantee high response rates.⁸⁸ Even if costs were not an issue, there are

87. See *In re Gen. Motors Pick-Up Truck Fuel Tank Litig.*, 55 F.3d 768, 785 (1995).

88. There is little empirical data on claimant response rates, although commentators believe that they are low. See Rubenstein, *supra* note 14, at 1657-58 (“[F]ew class members respond to court mailings and those who do are not representative.”).

other difficulties in ascertaining preferences. The standard economic assumption that class members' preferences are static and that claimants seek to maximize the payout on their claims is not entirely appropriate where claimants are not educated about their claims or where claimants are not engaged in repeated, similar transactions. Moreover, the settlements themselves are confusing and difficult to understand. Even if a decisionmaker was assured that claim maximization was the goal, substantive preference questions still arise because the possibilities for structuring payouts make for difficult choices. For example, reasonable claimants may differ as to whether a coupon or the promise of in-kind services or a *cy pres* fund is preferable to a cash payout of less value.⁸⁹

The substance of preferences collected depends on the level of education provided to class members and the methods by which preferences are ascertained. For example, class members may wish to realize values other than claim maximization; they may prefer to support consumer advocacy groups rather than obtain minimal individual compensation.⁹⁰ If the formulator of the question assumes that claim maximization is the only possible value, however, class members will not be able to express this preference. Because class members' preferences will depend on how informed they are, the institutional designer needs to determine how much education to provide, balancing the cost of education against the value of better decision making by class members.⁹¹

Even minimal participation demands informed class members, but under current practices, as a result of incomprehensible notices, uninformative fairness hearings, and alienated representatives, class members are uninformed. Thus, even if class members were willing to monitor their agents, they could not do so effectively, and courts do not fill the breach. For example, neither the Rules nor most courts require the parties to report on the ultimate payout at the end of settlement administration.⁹² They do not bar reversion of settlement funds to the

89. As one political scientist explained: "[u]nder the standard assumptions of modern economic theory, public choice theorists have demonstrated the logical impossibility of constructing any attractive, consistent procedure for making collective choices from unrestricted sets of three or more alternatives." LARRY M. BARTELS, *PRESIDENTIAL PRIMARIES AND THE DYNAMICS OF PUBLIC CHOICE* 296 (Princeton 1988). For an interesting discussion of nonpecuniary settlements and recommendations for evaluating such settlements, see Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 *LAW & CONTEMP. PROBS.* 97 (1997). The consumer class action settlements that have been most criticized tend to be coupon settlements in which class members receive the dubious opportunity to obtain more services from the defendant who cheated them in the first place. See, e.g., Wolfman & Morrison, *supra* note 5, at 472-77 (discussing inadequate coupon settlements).

90. See Patricia Sturdevant, *Using the Cy Pres Doctrine to Fund Consumer Advocacy*, 33 *TRIAL* 80 (November 1997) (arguing in favor of distributing residue of class settlements to consumer advocacy organizations); Kerry Barnett, Note, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 *YALE L. J.* 1591 (1987).

91. Bartels argues that students of governance should be concerned not with "summation of preferences" but with "formation of preferences." BARTELS, *supra* note 89, at 299.

92. For example, although the court in the *In re Mexico Money Transfer Litigation* retained

defendant to the extent that class members do not collect payment. Nor are "smooth sailing" agreements, in which defendants agree not to oppose class counsel's attorney's fee motion, forbidden.

Courts should ensure that an absence of objections is the result of well-educated class members being satisfied, rather than the result of objections being silenced.⁹³ This means encouraging objections, because class counsel cannot be relied upon to provide the court with necessary information to evaluate the settlement.⁹⁴ For example, in the *General Motors Pick-Up Truck Fuel Tank Litigation*, a settlement was nearly approved that would have provided class members with essentially non-transferable coupons for \$1000 off of the purchase of a new GM truck.⁹⁵ These coupons disfavored the two groups most likely to own the offending truck, class members who lack the funds to buy a new truck,

jurisdiction over the settlement to review the injunction consented to by the defendants, the court did not order the parties to return to demonstrate that the settlement had in fact achieved the predicted results. 164 F. Supp. 2d 1002, 1033-34 (N.D. Ill. 2000). Such decisions can create an incentive to exaggerate the predicted settlement amount to increase class counsel's fee award where attorney's fees are calculated on a percentage of the fund. For example, in *Roberts v. Bausch & Lomb, Inc.*, No. CV-94-C-1144-W (N.D. Ala. filed Nov. 1, 1994) discussed in HENSLER ET AL., *supra* note 2, at 145-73, the total settlement was presented to the court as approximately \$68 million depending on how many class members claimed rewards. The attorneys were paid \$8 million based on that representation, calculating a fee of a little less than fifteen percent. The parties were not required to report the ultimate payout to the court, but based on SEC filings, RAND researchers deduced that the defendant never allocated more than \$37.7 million to pay out all expenses relating to the litigation, including attorney's fees and administration costs. Thus there was likely a substantial overpayment to class counsel.

93. For example, in *Roberts v. Bausch & Lomb, Inc.*, there were no objectors. *Id.* Two other lawsuits had been filed in federal court in California and state court in New York, but rather than yielding objectors, the competing suits were settled for undisclosed amounts of attorneys' fees. See HENSLER ET AL., *supra* note 2, at 158-61. In that case, absent class members had no means of organizing an opposition or improvement to the settlement. This lack of participation may have had an effect on the settlement and on the award of attorneys' fees. The RAND study estimated that class members received a little over 30% of the fund. *Id.* at 429. See also Koniak & Cohen, *supra* note 9, at 1083-84 (describing BancBoston settlement with only one objector where class members were required to pay attorneys' fees in excess of their individual recoveries).

94. Class counsel and defendants' counsel cannot be relied on to point out injustice—they are equally likely to "put one over on the court." Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc), *quoted with approval in* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231, 2249 (1997). See *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 1995 U.S. Dist. Lexis 3507, at *19 (E.D. La. Mar 15, 1995) (settlement rejected as having a value of "effectively zero" based on involvement by objectors); *Bloyed v. Gen. Motors Corp.*, 881 S.W.2d 422 (Tex. App. 1994), *aff'd and remanded*, 916 S.W.2d 949 (Tex. 1996) (Texas Supreme Court's rejection of settlement as unfair based in large part on brief filed by objectors, Public Citizen Litigation Group and Center for Auto Safety).

95. See *In re Gen. Motors Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995).

and local governments that had fleets of trucks but were not likely to buy more during the applicable period.⁹⁶ The involvement of objectors and their appeal resulted in the settlement being overturned.⁹⁷ Thus, where responsible objectors have a serious and active role in the fairness hearing, they can often influence the result substantially.

Although in most cases the problem is too little objector involvement, objectors can also be the source of problems. Objectors' counsel have a perverse incentive to drop legitimate objections or soft-pedal them in order to obtain remuneration from the settlement because, to the extent that they are paid, objectors' counsel only receive payment if a settlement is approved.⁹⁸ As a result, objectors' counsel may try to use their leverage to extract undeserved rent from class counsel. Other times, objectors only marginally improve settlements but in a manner that also resembles self-dealing.⁹⁹ Fears of objectors multiplying proceedings or using their leverage to extract rent from class counsel have led some courts to impose significant sanctions against objectors.¹⁰⁰ As an empirical

96. See Wolfman & Morrison, *supra* note 5, at 472-77 (discussing the GM coupon settlement). Coupon settlements raise significant problems beyond the scope of this paper. Opponents of coupon settlements see coupon settlements as subject to serious abuse, especially when the coupons appear to be an advertisement for the defendant, and argue that consideration of whether a secondary market can be created in coupons should be required. *Id.* Other scholars believe that problems with coupon settlements can be overcome and that non-monetary settlements can be fair and efficient. See Miller & Singer, *supra* note 89. Miller testified in support of the *In re Mexico Money Transfer Litigation* coupon settlement on behalf of the defendants. 164 F. Supp. 2d at 1018-19 ("As Professor Miller explained to this court, a well designed coupon settlement can provide class members with more value than a cash settlement because the defendant is likely to be much more generous in its coupon offer.").

97. See *supra* note 95. The case was subsequently re-filed in Louisiana state court and the settlement affirmed with a revision that encouraged a secondary market in the coupons. See *White v. Gen. Motors Corp.*, 835 So.2d 892 (La. Ct. App. 2002).

98. Most courts have held that objectors may obtain fees to the extent that their objections benefited the class. See, e.g., *Gottlieb v. Barry*, 43 F.3d 474, 490-91 (10th Cir. 1994) (objector's fees appropriate where objectors "benefitted" the class).

99. For example, the objecting attorney in the *Mexico Money Transfer Litigation* was able to increase the ultimate settlement, but it is not clear how meaningful this increase was. This objecting attorney convinced the negotiating parties to make some substantive changes to the settlement, including adding a choice of one \$6 coupon instead of only two coupons valued at \$4.25, and doubling the *cy pres* donation from approximately two million dollars to four million dollars. See *In re Mex. Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1011 (N.D. Ill. 2000) (approving settlement that included *cy pres* fund where claimants were illegal immigrants thus difficult to find), discussed *supra* note 20.

100. See *Vollmer v. Publishers Clearing House*, 248 F.3d 698, 711 (7th Cir. 2001). In *Vollmer*, the district court levied \$50,000 in sanctions—to be donated to a charity—against objecting attorneys on the basis of evidence that the objecting attorneys had no opportunity to dispute. Many of these sanctions are brought under 28 U.S.C. § 1927 (2003), which provides that [a]ny attorney or other person admitted to conduct cases in any court of the United

matter, these fears may be exaggerated and such sanctions may over-deter objector involvement or chill valuable objections.

D. The Limits of Judicial Policing

"[C]ourts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries."¹⁰¹ Nevertheless, as one prominent class action scholar has noted, "[p]erhaps in no other context do we find courts entering binding decrees with such a complete lack of access to quality information and so completely dependent on the parties who have the most to gain from favorable court action."¹⁰² If judges approve a settlement in a case that they fundamentally believe is unsound,¹⁰³ or approve a poor settlement in a case they believe is strong,¹⁰⁴ then we may rightly be concerned about whether the judge is acting as an independent decisionmaker or granting judicial

States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Id. See also *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 278 F.3d 175, 193 (3d Cir. 2002) (upholding \$100,000 in sanctions against objecting counsel and reversing on due process grounds a "scarlet letter" sanction requiring that objecting counsel attach documentation of the sanctions proceeding to all future *pro hac vice* applications). The Court upheld the sanctions against the objecting counsel despite the lack of express finding of bad faith below. See *id.* 194 (Rosenn, J., dissenting).

101. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 280 (7th Cir. 2002) (Posner, J.) (overturning settlement of class action on grounds that district court did not scrutinize sufficiently whether the settlement was collusive and failed to quantify the net expected value of continued litigation). See also *In re Warner Communications Sec. Litig.*, 798 F.2d 35, 37 (2d Cir. 1986) ("a district court has the fiduciary responsibility of ensuring that the settlement is fair"); *In re Cendant Corp. Litig.*, 264 F.3d 286, 296 (3d Cir. 2001) (same).

102. Issacharoff, *supra* note 6, at 808.

103. See, e.g., *In re Mex. Money Transfer Litig.*, 267 F.3d 743, 748 (7th Cir. 2001) ("Were the class's claims worth more than \$40 million, plus *cypres* relief, plus the value of the injunction? Like the district court, we think not—indeed, we think that the claims had only nuisance value . . .").

104. Compare *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, Grady v. Rhone-Poulenc Rorer Inc., 516 U.S. 867 (1995) (denying certification of blood products class as unmanageable), with *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 159 F.3d 1016, 1020 (7th Cir. 1998), *cert. denied*, Mull & Mull, PLC v. Rhone-Poulenc Rorer, Inc., 526 U.S. 1081 (1999) (affirming approval of class-wide settlement of blood products claims and labeling settlement of individual cases with different levels of damages "downright weird"). This case is thoroughly described in HENSLER ET AL., *supra* note 2, at 293-317. The contrast between Judge Posner's opinion in the *Blood Products Litigation*, and Judge Posner's more recent decision in *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 280-81 (7th Cir. 2002), in which he asserted that judges have a fiduciary duty towards class members, is stark.

imprimatur to an inadequate result, perhaps in violation of her fiduciary duty to the class.

The judge's role in class actions ranges from the traditional responsibility to evaluate and determine cases, to the more modern responsibilities to manage the interaction of various actors, monitor agents, determine the extent of plaintiff participation, and encourage the case's resolution.¹⁰⁵ Checks on district judges making fairness determinations are limited by the deferential standard of review employed by the appellate courts.¹⁰⁶ Although judges are required to accept or reject settlements as they are, there is the possibility for judges to reject settlements and provide guidance to the parties as to what a fair settlement might look like.¹⁰⁷ The very things that make a judge a more experienced arbiter of the fairness of a class action settlement—her experience in the difficulty of crafting it—may influence her to approve the settlement in order to complete a long and arduous litigation and/or negotiation.¹⁰⁸ If a judge is inclined to involve herself and assist in the crafting of a fair settlement, this may create a bias on the part of the judge in favor of the settlement that she worked to create.

Under the current regime, judicial accountability for the settlement results in an unreliable governance structure. The extent to which judges police class actions is largely a matter of the individual judge's choice, influenced by traditional views of the attorney-client relationship and settlement as a form of private ordering. Not only will judges not do enough to review settlements, there is little incentive for continued judicial oversight in the administration phase. There is no requirement in the Federal Rules for judicial review of settlement administration. Although judges retain jurisdiction over settlements of class actions until administration is complete, whether the settlement administration will be reviewed or a final report issued is at the discretion of the individual judge or party request.¹⁰⁹ This lack of uniformity is compounded by incentives for judges to approve settlements and not to maintain active oversight over their subsequent administration. Judges understandably may choose to focus their

105. One example of this is Judge Weinstein's case resolution methods, described in PETER SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1987).

106. See *Joel A. v. Giuliani*, 218 F.3d 132, 139 (2d Cir. 2000) (standard of review of fairness determination is abuse of discretion).

107. "[I]t is not a district judge's job to dictate the terms of a class settlement; he should approve or disapprove a proffered agreement as it is placed before him and should not take it upon himself to modify its terms." *In re Warner Communication Secs. Litig.*, 798 F.2d 35, 37 (2d Cir. 1986). See also *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) ("The settlement must stand or fall in its entirety.").

108. See, e.g., *Twelve John Does v. District of Columbia*, 117 F.3d 571, 576 (D.C. Cir. 1997) (approving a settlement under the abuse of discretion standard and finding that "the district court's experience overseeing the case for nearly two decades" gave it "a unique familiarity with the issues and the performance of class counsel").

109. See *Tyson v. City of New York*, 97 Civ. 3762 (JSM), Submission of Proposed Stipulation of Settlement (Jan. 5, 2000) (on file with author) (requiring that administration of claims be completed before attorneys fees are awarded and providing for interim fees).

limited resources on cases currently being adjudicated. The prospect of continuing oversight when the parties have agreed to a settlement may strike some judges as superfluous.

Accordingly, judges are both a source of hope for class action governance, in that they are a ready-made monitor of self-interested class counsel, and a source of frustration, in that the protections afforded class members by judicial oversight are dependent on the discretion of the individual judge.

II. PROPOSED MODELS OF CLASS ACTION GOVERNANCE: THE LAST TWENTY YEARS

In the past twenty years, scholars have proposed various mechanisms for solving the problems of class action governance, particularly in the settlement phase where agent-principal problems are most acute and where judicial discretion plays a significant role. The proposed solutions to the various problems posed by class actions fall into three general categories: market solutions,¹¹⁰ democracy-based solutions,¹¹¹ and judicial administrative solutions.¹¹² Each of these offers significant contributions to aspects of class action problems, but each is fundamentally incomplete.

A. Market Solutions

Scholars have proposed numerous market mechanisms to solve the problems posed by small claims class actions. In looking for an analogy to class actions, some scholars have turned to corporate law.¹¹³ As in the corporate context, this theory maintains, the problem with class actions is an agent-principal problem,¹¹⁴

110. See, e.g., Coffee, *Accountability*, *supra* note 3, at 370 (advocating additional opt out mechanisms, i.e., "exit").

111. See, e.g., Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1185 (1982) (proposing "a theory of representation mandating full disclosure of, although not necessarily deference to, class sentiment").

112. See, e.g., Wolfman & Morrison, *supra* note 5, at 439 (proposing amendments to Rule 23 that increase judicial scrutiny of settlements and create more substantive guidelines for evaluating settlements); Shapiro, *supra* note 21, at 917, 922-23 (advocating an "entity" approach to class actions).

113. See, e.g., Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465 (1998) (making an explicit analogy to the corporate context).

114. See Resnik et al., *supra* note 24, at 374 (describing how economic analysis of litigation has been based on the agent-principal problem); Coffee, *Accountability*, *supra* note 3, at 375 (describing class action as an "organizational form" involving a "principal/agent relationship"). But see Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 24, at 683-84.

Yet for analytical purposes, one better understands the behavior of the plaintiff's attorney in class and derivative actions if one views him not as an agent, but more as an entrepreneur who regards a litigation as a risky asset that requires continuing investment decisions. Furthermore, a purely fiduciary perspective is misleading because it assumes

arising from the fact that the class members' ownership of their claims is separated from control over those claims. Accordingly, scholars urge that class action reform requires policy-makers to "consider market-based remedies and checking mechanisms that have worked in related contexts to align the interests of the principal and the agent."¹¹⁵ The two most prominent market mechanisms proposed in the class action literature concern the structure of attorney fee awards and the availability of opt outs.¹¹⁶

1. Attorneys' Fees.—Monitoring class counsel is central to class action governance. Legal economists have focused their attention on the incentive structure for class counsel to "pursue their own interests at the expense of the class" resulting in cheap settlements.¹¹⁷ As courts and commentators have noted, class counsel have an incentive to engage in self-dealing regardless of their ethical obligations and duties to the class.¹¹⁸ Some scholars propose creating

that the client's preferences with respect to when an action should be settled are exogenously determined, when, in fact, they are largely influenced by the fee award formula adopted by the court.

115. Coffee, *Accountability*, *supra* note 3, at 371. Under this view, class members may be deemed to have consented to representation by the attorney where "the agency costs associated with the relationship have been minimized." *Id.* at 376. There have been numerous propositions for methods of aligning class counsel's interests with those of the class. See, e.g., Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1088 (2002) (advocating that class counsel be paid in the same currency as the class).

116. Some scholars have even proposed to do away with the class members altogether by auctioning off their claims to the highest bidder. See Macey & Miller, *supra* note 7, at 6 (proposing a class action regime whereby claims are auctioned off to attorneys). This proposal has generated an interesting scholarly discussion. See, e.g., Randall S. Thomas & Robert G. Hansen, *Auctioning Class Action and Derivative Lawsuits: A Critical Analysis*, 87 NW. U. L. REV. 423, 424-25 (1993). Thomas & Hansen only address auctions of the right to *represent* the class, not auctions for purchase of class claims.

117. *Staton v. Boeing Co.*, 313 F.3d 447, 467 n.12 (9th Cir. 2002), *withdrawn and reh'g denied*, 327 F.3d 938 (9th Cir. 2003).

Even when there is no direct proof of explicit collusion, there is always the possibility in class action settlements that the defendant, class counsel, and class representatives will all pursue their own interests at the expense of the class. For that reason, the absence of direct proof of collusion does not reduce the need for careful review of the fairness of the settlement, particularly those aspects of the settlement that could constitute inducements to the participants in the negotiation to forego pursuit of class interests.

Id. See also Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 24, at 669.

118. Courts have held that class counsel owes a fiduciary duty to the class as a whole. See *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995) ("Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed."); *Stewart v. Gen. Motors Corp.*, 756 F.2d 1285, 1294 n.5 (7th Cir. 1985) (citation omitted) ("[B]oth the class

competition among attorneys for the privilege of representing a class.¹¹⁹ Others propose giving a powerful plaintiff the ability to negotiate a market rate on behalf of the class.¹²⁰ Still others propose fee regimes that reward class counsel incrementally, based on the actual benefits conferred to the class,¹²¹ or attempt to solve the problem by subsidizing rival class actions amongst which class members can choose.¹²²

Of the proposals put forward, the one most consistent with accepted attorney compensation norms is to link attorneys' fees to the amount of benefit the attorney provides the class, with a marginally increased percentage of the fund going to the attorney to encourage the maximization of claimholder value.¹²³ Large fee awards are beneficial because they create an incentive for attorneys to bring small claims suits as private attorneys general, and it makes sense to link that incentive directly to the benefits conferred to the class.¹²⁴ Yet, it also makes sense to limit percentage fee awards so that they bear some relationship to the effort expended by the attorneys and do not become a windfall to attorneys at the expense of the class. The problem is that there is little empirical evidence to help judges determine the appropriate percentage of the fund to give to attorneys to attract responsible and experienced attorneys to bring class action suits and to compensate for the risk that they incur in taking on such suits, without offending sensibilities. Setting a loadstar cap on attorneys' fees would mitigate the concern that attorneys receive a windfall, but even setting such a cap is difficult without more information on how the balance should be struck.

Another solution that has been much discussed in the literature is auctioning

determination and designation of counsel as class representative come through judicial determinations, and the attorney so benefited serves in something of a position of public trust.").

119. See Macey & Miller, *supra* note 7, at 6 (proposing auctions for the position of class counsel); Koniak & Cohen, *supra* note 9, at 1113-14 (advocating same and arguing that the absence of auctions may constitute an antitrust violation).

120. Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel By Auction*, 102 COLUM. L. REV. 650 (2002) (criticizing auctions and proposing stronger lead plaintiffs as an alternative solution to the agent-principal problem).

121. See Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 24, at 725. Compare *Third Circuit Task Force Report on Selection of Class Counsel*, 74 TEMP. L. REV. 689, 704-05 (2001) (advising that "[t]he traditional methods of selecting class counsel, with significant reliance on private ordering, are preferable to auctions in most class action cases. In using those traditional methods, however, the court must guard against overstaffing by lawyer groups."), with John C. Coffee, Jr., *Litigation Governance: A Gentle Critique of the Third Circuit Task Force Report*, 74 TEMP. L. REV. 805, 808 (2001) [hereinafter Coffee, *Litigation Governance*] (arguing that "private ordering works least well when agency costs are high and competition is limited." Also noting that "as a general rule, professional groups have little incentive to seek increased competition or lower fees, and professional ethical norms generally are enforced only against outliers and insurgents.").

122. See Coffee, *Accountability*, *supra* note 3, at 424.

123. See Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 24, at 725.

124. See *id.* at 721-25.

off the right to represent a class.¹²⁵ In essence, the auction proposal entails potential class counsel submitting proposals for representation and fees at the beginning of the suit, and the court awarding the case to the lowest bidding counsel.¹²⁶ This proposal may reduce attorneys' fees, but will do little to eliminate agency costs. Attorneys may "settle early in order to obtain a larger profit on the fee"¹²⁷ or, if they are obtaining a percentage of the total fund, exaggerate the value of the settlement to increase their compensation. An auction may produce lower attorneys' fees, but may not obtain the best quality or most experienced counsel.¹²⁸ As their proponents concede, they cannot eliminate agency costs associated with the attorney-class relationship.¹²⁹ Thus, on their own terms, attorneys' fee mechanisms are an incomplete solution to class action problems.

The agent-principal analysis of class actions has led to an overemphasis on mechanisms to control attorneys' fees. An attorneys' fee solution to class action governance is analogous to a corporate governance scheme based solely on controlling executive compensation. The observation that various forms of self-dealing, including "cheap settlements," are the likely result of a flawed fee regime is accurate, but it captures only one aspect of the weak governance structure of class actions.

2. *Opt Outs*.—Opt outs are the only exit mechanism available to class members. Recognizing that the absence of competition diminishes the significance of opt outs, John Coffee has proposed the creation of a market in opt

125. See Macey & Miller, *supra* note 7, at 105-18 (describing proposals for auctioning off claims and for auctioning rights to represent the class).

126. See, e.g., *In re Oracle Secs. Litig.*, 131 F.R.D. 688, 689-90 (N.D. Cal. 1990) (ruling that competitive bidding would determine selection of class counsel and counsel's compensation). See also Koniak & Cohen, *supra* note 9, at 1202-06 (arguing that market for representation of class should be competitive and that current system may be an antitrust violation). The revised Rule 23(g) offers something in this regard by permitting the court to choose class counsel. In a twist on this idea, Geoffrey Miller has also proposed auctions for class counsel after settlement has been reached, permitting rival class counsel to post a bond for the settlement amount and attempt to negotiate a better deal for the class. See Geoffrey P. Miller, *Competing Bids in Class Action Settlements*, 31 HOFSTRA L. REV. 633 (2003).

127. Macey & Miller, *supra* note 7, at 113.

128. *Id.* at 113; Lucian Arye Bebchuk, *The Questionable Case for Using Auctions to Select Lead Counsel*, 80 WASH. U. L.Q. 889, 892 (2002); Coffee, *Litigation Governance*, *supra* note 121. See also Fisch, *supra* note 120, at 652 (arguing that auctions are poor tools for selecting firms based on multiple criteria, that auctions compromise the judicial role, and that they are unlikely to produce reasonable fee awards as an empirical matter).

129. It does not seem rational that an attorney who has purchased the rights to a class action at a slightly lower fee will take the nuances of class interests into account any more than the attorney entitled to potentially exorbitant fees. One might even think that the auction attorney is less likely to take class desires seriously, so long as they do not affect the ability of the class action settlement to be approved or otherwise interfere with the total recovery, because he has an even greater sense of ownership over the lawsuit than the "joint venturing" class action attorney did.

outs rather like a hostile takeover in the corporate context.¹³⁰ When a settlement has been proposed, attorneys who wish to represent dissenting class members would be permitted to include a “counter-solicitation” in the notice of settlement sent to class members, inviting them to opt out of the settlement.¹³¹ If successful, these competing attorneys would organize dissatisfied class members and file a competing class action.¹³² According to Coffee, this approach would solve the abandonment problem of opt outs without threatening “the finality of settlements nor encourag[ing] collateral attacks on the class settlement.”¹³³ It would be relatively cost efficient because the “counter-solicitation” could be included with the regular settlement notice.¹³⁴ Finally, it would provide greater opportunity for the substantive exercise of class member autonomy at least to the extent that the choices presented are reasonably attractive to the class members.

To create a viable market in opt outs, the potential gain from competition would have to be greater than the cost of the new attorney and the rival solicitation. We might predict that competition would be limited where a settlement is inadequate but the value that the rival attorney is able to extract from the sub-class is not high enough to merit the investment in organizing a rival solicitation. Without empirical analysis, it is difficult to tell whether that result is optimal in terms of the regulatory function of small claims class actions and whether the cost of mounting a rival action would be too high for attorney entrepreneurs.¹³⁵ It is worth noting that in the securities context, when sophisticated class members are dissatisfied with class counsel, instead of creating rival class actions by organizing opt outs, these potential lead plaintiffs prefer to opt out and file independent actions in state court.¹³⁶

Coffee recognizes some of the problems with this creative proposal,¹³⁷ yet

130. See Coffee, *Accountability*, *supra* note 3, at 422.

131. *Id.* at 423.

132. *Id.*

133. *Id.* at 424.

134. *Id.* at 423-24.

135. Even if rival attorneys are permitted to solicit opt outs in settlement notices, the cost and risks of pursuing such a rival class action may be too high for attorney entrepreneurs in small claims actions. Interview with Joseph Grundfest, W.A. Franke Professor of Law and Business, Stanford Law School (Feb. 13, 2003).

136. See, e.g., *Cal. State Teachers' Ret. Sys. v. Qwest Communications Int'l*, No. 415546 (Cal. Super. Ct., San Francisco County filed Dec. 10, 2002), available at <http://www.sftc.org/> (state lawsuit with no class or federal claims filed to avoid class litigation); *UC Sues Firms with WorldCom Ties*, L.A. TIMES, Feb. 14, 2003, at C4 (Regents of the University of California, which had purchased 10.2 million shares of Worldcom between 1998 and 2000, pulled out of nationwide federal class action and commenced suit on their own.). These plaintiffs bring only state court claims to avoid removal and class adjudication.

137. Coffee notes that counter-solicitations create the danger that the class will become too fragmented as a result of significant number of proxy proposals, and proposes that the problem of too many proxy proposals might be solved by requiring insurgent counsel to pay reasonable costs of printing and mailing proposals (as the SEC handles hostile proxy solicitations). Counter-

leaves many questions unanswered. How would class members intelligently choose among the multi-factored proposals likely to arise and the associated risks? More than likely, such rival solicitations would require opt outs to give up the proverbial bird in the hand for a bird in the bush.¹³⁸ Would there be disclosure requirements that enabled class members to make these choices and, if so, how much disclosure or education would be necessary and in what form?¹³⁹

Second, this market model would suffer the same agent-principal problems observed under the current regime. The incentives of class counsel and rival attorneys would continue to be the same: to maximize their own payout by settling early or for inadequate amounts. Rival attorneys may be bought out or co-opted, as happens in competing class actions under the current regime. Thus, even if there were such competition, agent monitoring would still be necessary. Moreover, this competitive model would further hamper the ability of the court to act as such a monitor and to evaluate the fairness of settlements because the process of soliciting opt outs would siphon objectors away to the new action rather than encourage them to voice their objections to the proposed settlement. In addition, judges would have a difficult time determining whether in any particular case a lack of competition for opt outs is the result of market inefficiencies or an indication that the settlement is indeed fair.¹⁴⁰

A rising trend that bears some relationship to the rival solicitation proposal

solicitation could also be made contingent on rival counsel getting enough support, and the court could refuse to permit rival solicitation if too few class members sign on or otherwise fail tests of Rule 23. See Coffee, *Accountability*, *supra* note 3, at 426. Coffee also suggests that a court could arbitrarily limit the number of competing solicitations (to two or three) "leaving others to contact class members on their own if they wished." *Id.* at 426. On the other hand, if the number of rival solicitations are limited to avoid fragmentation, then the class may be denied the full panoply of choices that a true market would offer. *Id.* Rival attorneys may experience judicial hostility to a proposal intended to delay and complicate an existing settlement process. *Id.* at 427. Additionally, there may be substantial reputational costs for prestigious class action firms to mount counter-solicitations. In a world where class action attorneys are repeat players, it is not difficult to imagine that there may be costs meted upon dissident counsel. As a result, the type of experienced attorneys one would ideally want to run a rival class action may not be willing to create such a rivalry unless the gain is substantial enough to outweigh the potential reputational costs.

138. This differentiates the proposal from the hostile takeover context where the shareholders are offered specific sums of money for their shares: "the class member is still very much subject to risk, while the shareholder who accepts a cash tender offer is no longer subject to the risks of the enterprise." Coffee, *Accountability*, *supra* note 3, at 423 n.140.

139. Such a rival solicitation may also face other hurdles, such as when class dissatisfaction is based on non-monetary factors, including class counsel's relationship with the class, a desire for greater voice, or the desire for non-monetary relief out of which it would be difficult to take a contingency share.

140. Similarly, in the current regime it is difficult for courts to determine whether a small number of objectors is the result of the fact that there are too many barriers to objection or of the settlement being genuinely fair.

is the devolution of class actions to state courts.¹⁴¹ Charles M. Tiebout's familiar model of local government provides a useful analogy.¹⁴² Tiebout theorized that the distribution of public goods in a given community reflects local preferences because a consumer-voter will pick the community "which best satisfies his preference pattern for public goods."¹⁴³ The natural corollary of this proposition is that "[t]he greater the number of communities and the greater the variance among them, the closer the consumer will come to fully realizing his preference position."¹⁴⁴ If compensation through a class action is a public good, then it would seem that permitting class members a choice would maximize their ability to obtain a preferential benefit from the class action mechanism. But if the choice is a stark one between obtaining nothing (which is the normal result of opting out in most small claims class actions) and joining an inadequate settlement, the "choice" is only in name.

Applying Tiebout's theory to class actions, we can envision a regime that would encourage class actions on a local scale instead of collecting claims into nationwide class actions.¹⁴⁵ Local class actions would be more manageable and actions based on state laws would not suffer from choice of law problems. Localization would make public monitoring by the states' attorneys general easier. It would also create a kind of competitive environment, allowing courts to compare the terms of settlements with those of similar class actions in other states. On the other hand, this type of "market" in class actions, demarcated along state boundaries, does not offer class members greater choice and autonomy. Moreover, localization would reduce the efficiencies achieved by national class actions. Finally, further localization may not be feasible at a time when policy makers, attorneys and judges, are increasingly enlarging class actions, expanding defendants' ability to remove such actions to federal court and settle them as nationwide class actions rather than permitting them to be split off by jurisdiction.¹⁴⁶

The central limitation of exit mechanisms as a sole solution to unsatisfactory settlements is the same problem as all exit mechanisms in markets with limited competition share: limited and ineffective opportunities to opt out benefit the

141. See *supra* note 44 and accompanying text (describing state class actions limited to citizens of forum state).

142. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). See, e.g., William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L. J. 201 (1997) (criticizing Tiebout's model); Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 25-33 (1998) (criticizing Tiebout's model among other things for the unrealistic assumption that some people choose poor service communities and noting limits of mobility in the real world).

143. Tiebout, *supra* note 142, at 418.

144. *Id.*

145. See *supra* note 44 (discussing nascent trend towards localized class actions).

146. One example is the Class Action Fairness Act of 2003, S. 274, 108th Cong. § 4 (2003), discussed *supra* note 45. It seems clear that legislation advocating unchecked removal of class actions to federal courts is not necessarily protective of class members, but rather favors defendants.

decisionmakers, who are spared the trouble of addressing genuine concerns because their most vociferous opponents have left the stage.¹⁴⁷ It is more beneficial for the architects of a class-wide settlement to permit some opt outs as a kind of safety valve to get rid of dissenting voices, than to allow a realistic option that might scuttle settlement. Thus we often see courts validating settlements on the basis that class members had an opportunity to opt out and chose not to do so, without looking to the role of the opt out as a mechanism for minimizing dissent.¹⁴⁸ Like attorneys' fee regimes, exit mechanisms alone are not a satisfactory solution to the governance problems in class actions.

These types of market mechanisms ignore a central difference between agent principal problems in the class action context as opposed to the corporate context. For claimants the class action is a single, unique transaction, and subsequent market penalties for singular instances of mismanagement are inadequate.¹⁴⁹ The complex problems in class action governance cannot be resolved by resort to a single incentive mechanism because class actions are not merely a function of the plaintiffs' attorney. A simple market model would not work even if there were vigorous competition between class counsel bringing identical class actions—which in itself creates obvious inefficiencies—because the panacea of attorney competition overlooks the role of other actors in class action governance, including judges, class members, objectors, and opt-outs. These observations represent a significant hurdle to any market solution to class action problems.¹⁵⁰

B. Democratic Solutions

Another source for class action governance mechanisms is democratic theory. Rule 23(b)(3) provides a number of mechanisms that resemble political

147. "Those who hold power in the lazy monopoly may actually have an interest in *creating* some limited opportunities for exit on the part of those whose voice might be uncomfortable." HIRSCHMAN, *supra* note 60, at 60. Some limited competition may actually comfort monopolist by taking away the most vocal customers. *Id.* at 59.

148. See discussion *supra* at note 73 (discussing court treatment of opt outs and objections in settlement context); see also *Devlin v. Scardelletti*, 536 U.S. 1, 122 S. Ct. 2005, 2011 (2002) (noting that because class member was denied opt out, appeal gained greater importance for him to protect himself).

149. See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 103 (1991) (discussing the ineffectiveness of market mechanisms on singular breaches of fiduciary duty in the corporate context). In the corporate context, voting and purchasing mechanisms, as well as boards of directors, discipline management. Shares are fungible, and regulation attempts to create transparency of information on which shareholders base their investments. That is simply not the case in non-fungible small claims class actions where claimants do not "opt in"; there are no disclosure mechanisms and only the judge, who is not elected by the claimants, disciplines class counsel.

150. This is not to say that market solutions cannot cure some of what ails class actions, but that market mechanisms alone do not provide a complete governance system.

devices. The class as a group has a representative in the proceedings.¹⁵¹ The fairness hearing provides a forum where the merits of settlement proposals are presented and discussed prior to the judge's decision. In deciding whether to approve a settlement, judges take into account certain displays of popular will from the class, such as numerous opt outs or objections to the settlement.¹⁵²

Scholars have proposed democratic governance structures for class actions in the context of civil rights injunctive actions.¹⁵³ However, deliberative solutions have not been a prominent part of the discourse concerning consumer class actions. This may be because consumer class actions are viewed more as an economic matter than a political one, whereas civil rights actions relate directly to the political realm. Viewed in this light, it may seem hypocritical to permit experts to run a civil rights action in order to vindicate democratic values, particularly when the underlying claim relates to some form of disenfranchisement from the political or social sphere. Perhaps deliberation in the civil rights context is seen to "rectify the antidemocratic exclusion of chronically disadvantaged groups from the theatre of politics."¹⁵⁴

Democratic values have relevance, however, even to complaints based on economic harms. The observation that "[d]emocratic decisionmaking is an attractive alternative to unrestrained liberty because it provides a means for reining in the self-appointed community representative; it also checks the alienation and disempowerment that result from overreliance on lawyers"¹⁵⁵ applies just as well to the consumer class action context. The mandatory nature of injunctive civil rights actions is not a sufficient reason to limit democratic proposals to them because opt outs do not provide a true alternative in the small claims context. Furthermore, there is nothing inherent in consumer issues, as opposed to civil rights issues, that render them less amenable to class member input into their resolution. Although consumer class actions generally address small individual claims, they are nevertheless significant protective and preventive mechanisms in a world where interactions with economically and politically powerful corporations are such a pervasive aspect of people's daily

151. See FED. R. CIV. P. 23(a)(4). Although it is not clear what "representation" means in this context, as discussed below, this provision indicates that some importance is attached to the voice of class members.

152. See *supra* text accompanying note 65-70 (discussing the judicial approach to opt outs) and note 72-73 (discussing the judicial approach to objectors).

153. Examples of discussions of the role of democratic decision making processes in civil rights class actions include Rhode, *supra* note 111, at 1191-92 and Rubenstein, *supra* note 14, at 1663-68. My research has not revealed substantial scholarship making a consistent argument for a democratic approach of any kind to class actions outside the area of civil rights injunctive class actions. Cf. Elizabeth J. Cabraser, *Enforcing the Social Compact Through Representative Litigation*, 33 CONN. L. REV. 1239 (2001) (discussing the representative litigation as an aspect of the realization of the American social contract).

154. Rubenstein, *supra* note 14, at 1659 (quoting Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 619 (1995)).

155. *Id.* at 1659-60.

life.

In the mass tort context, scholars' discussions of participation values have been limited to support or rejection of the idea of universal, particularized adjudication.¹⁵⁶ However, the argument that small claims (or even mass tort) plaintiffs do not have a process right to individual participation that trumps the right of the public or defendant to conserve resources,¹⁵⁷ as one prominent scholar has argued, should not necessarily mean that policy makers should ignore methods for *collective* input from the class into the settlement process. The question is whether it is possible to realize democratic values in the small claims class action in the absence of individualized adjudication.

It may be inherently good for collective settlements to reflect democratic processes because they are political; their regulatory role makes them so.¹⁵⁸ Furthermore, settlements can be preference forming as well as preference expressive vehicles. They can create expectations as to the class' specific claims and future suits.¹⁵⁹ Just because the class action settlement is a transaction does not mean that it needs to be viewed as a purely private transaction with no political dimension or as limited to class counsel and defendants.

1. *Representation.*—The Rule 23(a)(4) requirement of "adequate representation" raises an obvious comparison to representative democracy. Although self-appointed representatives are more in keeping with dictatorial systems of government than with representative democracy,¹⁶⁰ as political theorists remind us, representation "need have nothing to do with popular self-government."¹⁶¹ A representative may merely be someone with the authority to act on behalf of her constituency.¹⁶²

Scholars and courts have struggled to create a thicker description of what

156. See Rosenberg, *supra* note 19, at 211-12 (arguing against the idea that self-determination requires individualized litigation); see also Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5, 9-14 (1991) (discussing the 1966 Advisory Committee's concerns about applying class action to mass torts).

157. See Rosenberg, *supra* note 19, at 213 n.6.

158. Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1503 (1988) (discussing political participation as a positive human good).

159. See Alexander, *supra* note 22, at 500 (criticizing settlements in securities class actions that are settled at a "going rate" rather than based on the strength of the parties' claims).

160. See Fiss, *supra* note 25, at 25.

161. HANNA F. PITKIN, *THE CONCEPT OF REPRESENTATION* 2 (1972).

162. To the extent one can argue that class representatives represent at all, it is in the Burkean conception of the representative as a trustee without accountability. As Burke wrote, "[t]he king is the representative of the people; so are the lords; so are the judges. They are all trustees for the people." Quoted in PITKIN, *supra* note 161, at 129. Under the current damages class action regime, the representative appears to lack both the authority to act, because the lawyer is in fact the representative with authority, and has no accountability to the class membership. It is not clear, under this scenario, where the content of the notion of "class representative" is to be derived. A class representative chosen by an attorney or self-appointed, without the power to make decisions, is a "representative" only in the thinnest sense.

role representatives take in the class context and of the source, if any, of their legitimacy.¹⁶³ Some scholars have defined the legitimacy of the representative in the class context as inhering in her ability to be a “mirror” of the class.¹⁶⁴ She is a representative in the sense that she has suffered the same injury or asserts the same claims as absent class members. This view stands behind the logic of the cohesion theory of representation.¹⁶⁵ Cohesion theory assumes that if the claims are identical, the class representative will necessarily follow the intent of the class as a whole.¹⁶⁶

This conception is unsatisfactory for several reasons. First, it assumes that the representative is imbued with the power to control the litigation. Under our

163. See Rhode, *supra* note 111, at 1191-92. Rhode describes how, because of class certification, the requirement that representative parties will fairly and adequately represent the class is of constitutional dimension, but that this requirement does not tell litigants what it means to “adequately protect” the “interests” of the class and asks, “Do the named representative and counsel serve primarily as ‘instructed delegates’ pursuing objectives to which a majority of class members subscribe?” *Id.* at 1192. Or, in the alternative, “does the representative role track Edmund Burke’s notion of an ‘enlightened trustee,’ who makes an independent assessment of class concerns?” *Id.* at 1192-93. She concludes that courts have “done little more than acknowledge the absence of any ‘clear principles governing the allocation of decisionmaking authority between the attorney and the class.’” *Id.* at 1193. Twenty years later, this appears to still be the case. See also Coffee, *Accountability*, *supra* note 3, at 373 (critiquing the Supreme Court’s treatment of the notion of representativeness and class cohesion as overly formalistic). The Burkean notion of the representative as a trustee with special expertise (that is, the lawyer) is often rejected as overly paternalistic and not in keeping with ideas of litigation as an autonomous act. For a sustained discussion of the expertise model in this context, see Rubenstein, *supra* note 14, at 1163-68. For a thoughtful historical discussion of the relationship between representation and participation, see Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 297-98 (1990) (reviewing STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION) (concluding that 23(b)(3) class actions in some ways resemble participation-based representative suits).

164. See Coffee, *Accountability*, *supra* note 3, at 375 (discussing the representative as “mirror image”).

165. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997) (whether class should be divided into multiple, independently represented sub-classes depends on whether the class “has sufficient unity so that absent members can fairly be bound by decisions of class representatives”). This conception originates in the requirements of commonality and typicality found in Rule 23(a). Although on its facts *Amchem* is a mass torts case, its language provides an overarching ruling concerning the basis of representation in class actions generally.

166. It is not clear how proponents of the cohesion principle believe that the translation from the individual representatives interests to group interests occurs—whether the representative’s decisions will reflect the decisions of each individual member or will reflect the range of decisions that the groups many members would have made. What is clear is that the cohesion principle is based on the theory that the right of representation is “not a day in court but the right to have one’s interest adequately represented.” Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 970-71 (1993).

current regime, the real authority to make decisions on behalf of the class rests with the class' attorney.¹⁶⁷ Significant additional oversight mechanisms would have to be instituted to make the class representative an effective monitor of attorney conduct. Second, it requires a very high level of identity between the representative and the class. Such a level of identity may not be entirely possible, nor entirely necessary to good governance. It is difficult to draw the line between those individual qualities of class members that require identity and those qualities that do not matter for purposes of representation. As a corollary, the Rule 23 typicality requirement, together with the representation requirement, places reliance on the court's ability to determine that the class representative is in fact like the class in all material ways and will make rational choices on their behalf. This determination is, to put it mildly, an inexact science and no provision is made for situations in which the representatives' differences from other members of the class subsequently become material.¹⁶⁸ Finally, the cohesion principle attempts to define away the problem of inter-class discord by removing from the discourse the individuals who may disagree.

It is difficult to imagine a class achieving this strong coherence requirement and still retaining the efficiency of the class action device.¹⁶⁹ Cohesion and efficiency are in tension with one another. The looser the concept of cohesion, the more efficiently claims can be disposed of through the class action mechanism. The tighter the concept of cohesion, the more difficult it is to forge a class action. There are two equally unpalatable ways to achieve cohesion: remove individuals with different interests from the class, thereby narrowing it to a near impossibility, or redefine their interests in a cribbed and unrealistic way. Either way, it does not provide an underlying rational for the legitimacy of any one particular group identity or for the particular representative appointed to defend its interests.

2. *Deliberation.*—Some scholars have turned to democratic deliberation as a model for listening to class members. In exploring the idea of deliberation in the class context, Deborah Rhode presented two models: pluralism and majoritarianism.¹⁷⁰ The pluralism model consisted of individualized representation for discrete constituencies within the class.¹⁷¹ As commentators have noted, successive sub-classification has the potential to fragment the class

167. See *supra* note 6 (describing the view that class counsel is the true architect of class actions).

168. For example, what if the representative is lazy, risk averse or a risk seeker? See Coffee, *Accountability*, *supra* note 3, at 375 (discussing potential problems with representative).

169. See discussion *supra*, accompanying notes 17-25 (discussing the efficiency basis for class action litigation).

170. See Rhode, *supra* note 111, at 1185.

171. See *id.* This is similar to the model that was eventually adopted by the Supreme Court in mass tort cases under the guise of adherence to the cohesion principle. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999) (requiring sub-classification where sub groups within class have conflicts of interests).

action out of existence.¹⁷² On the other hand, this model also has the potential to create small, more manageable and responsive, class actions. Without more development as to what governance of sub-classes means, this proposal suffers from the same problems of the cohesion principle; it assumes that a smaller scale will cure the multiple problems of class actions.

The majoritarian model would ascertain members' preferences through polls or plebiscites.¹⁷³ But within this model, some entity must still shape and ask the questions and oversee the referendum process.¹⁷⁴ Majoritarianism also assumes that preferences are clear and ascertainable, not contentious, disparate and dynamic, and just need to be "collected," although this conflicts with most people's experience.¹⁷⁵ Furthermore, there are practical barriers to plebiscites, such as the natural apathy of class members with small stakes in the litigation¹⁷⁶ and the cost of voting mechanisms as well as voter education.¹⁷⁷ Commentators

172. See Coffee, *Accountability*, *supra* note 3, at 374.

173. See Rhode, *supra* note 111, at 1185.

174. Not every aspect of a case is amenable to voting or deliberation, such as purely strategic legal decisions that would be made by the attorney alone in a traditional attorney-client relationship. See Rubenstein, *supra* note 14, at 1654 ("Democratic values would lend significant legitimacy to goal-based decisions, but would have less applicability to the more technical decisions about legal strategies."). Furthermore, as Rhode herself points out, public choice models demonstrate how agenda setting can shape results. See Rhode, *supra* note 111, at 1236. See also Rubenstein, *supra* note 14, at 1656-57 (discussing hurdles to voting). In addition, there is what Rhode called the "unarticulated premise" against majority vote, that "[t]he class as an entity has interests beyond those expressed by its current constituents." Rhode, *supra* note 111, at 1241. In consumer class actions, third parties may have an interest in the outcome of the class action. For example, the public has an interest in the adequacy of deterrence and in avoiding over-deterrence.

175. See discussion *supra* note 88-89 (describing the difficulty of ascertaining class member preferences).

176. One of the most important and largely unresolved hurdles to a plebiscite is participation. Scholars have recognized the difficulties of getting class members to respond to communications from class counsel, especially where the stakes are relatively small. "Few class members respond to court mailings and those who do are not representative." Rubenstein, *supra* note 14, at 1657-58. See also Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Legitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 466 n.35 (1997) ("The likelihood that a class member will actually receive and comprehend the notice of the action is in every case very small. Frequently, the cost of reading and understanding the notice exceeds the benefits, and not infrequently, the notice is impenetrable by the average citizen."). These scholars have had difficulty resolving the lack of participation without resorting to a model based on attorney expertise. Rubenstein, *supra* note 14, at 1663-68. Rubenstein argues that the expertise model has been given short shrift, and that attorney expertise has its place in group litigation, such as in making procedural or technical decisions. *Id.*

177. One cannot easily disaggregate the difficulty of obtaining class member participation from the types of participation class members have been permitted. Attorneys have incentives to keep class members out of the negotiation and settlement process and notices are often mind-numbingly difficult to read. These factors must be added to the cost-benefit analysis of class member

have also expressed the paternalistic concern that class members will not know what is best for them, or will choose the wrong result out of shortsightedness.¹⁷⁸

Another approach is consultation-based deliberation.¹⁷⁹ One concrete proposal is a procedural ‘community consultation’ requirement for class actions.¹⁸⁰ Such a procedural requirement may help to alleviate concerns about coercion in the beginning of the class action lawsuit, although it would require procedural reform and would likely be difficult to implement.¹⁸¹ By what criteria will decisionmakers determine the sufficiency of consultation? This type of solution is particularly difficult to implement in consumer class actions because of the lack of a coherent “community” with which to consult.

There are some analogies to community consultation in the context of small claims class actions. Courts might seek out consumer advocacy groups or, if one demographic is particularly affected, “community representatives” of that group, although that concept is problematic as well. This has occasionally occurred in the context of *cy pres* settlements. In *In re Mexico Money Transfer Litigation*, for example, a case concerning a class made up almost entirely of Mexican-Americans and Mexican residents of the United States who transferred funds to their families in Mexico, the district court heard testimony from a number of representatives of Mexican communities in the affected areas concerning the four million dollar *cy pres* fund.¹⁸² In that case, both the objectors and class counsel brought forward community representatives, the end result of which was

participation.

178. See Rhode, *supra* note 111, at 1237 (articulating concerns that class members’ positions may be due to posturing or reflect peer pressure, or that class members views may not result in the best outcome because they are too risk averse or risk seeking).

179. In seeking an alternative to exclusive attorney decision-making in the civil rights context, Rhode advocated a “theory of representation mandating full disclosure of, although not necessarily deference to, class sentiment.” *Id.* at 1185.

180. Rubenstein seeks to use procedural and ethical rules to “promote more democratic means of client goal-setting and more expertise-driven norms of attorney decisionmaking in group litigation.” Rubenstein, *supra* note 14, at 1668. He proposes rules requiring lawyers to show that they had some community interaction prior to their decision to file, or to show community participation or that democratically elected representatives approve of the action. *Id.* at 1659. For example, he suggests a kind of “community derivative suit,” in which the representative would have to file a special pleading showing that the case “grew out of some prefiling democratic processes” and if the action did not “flow from a democratically produced group decision” it could be dismissed. *Id.* at 1670-71. Rubenstein recognizes that this deliberative model, which offers only limited participation, would be difficult to implement and would potentially create an overwhelming barrier to suits.

181. Rubenstein notes the problems with the “community derivative” idea are that there is no literal “community” with a principal place of business, the idea of community likened to corporations could lead to less democracy because some sub-groups might get undue power and the procedural hurdle would be costly and might undermine civil rights suits generally. See *id.* at 1672-73.

182. 164 F. Supp. 2d 1002, 1020-21 (N.D. Ill. 2000), *aff’d*, 267 F.3d 743 (7th Cir. 2001).

something similar to a battle of the experts.¹⁸³ Although such community involvement can lead to consensus, it may also reflect or even increase differences within the group. Such consultation can deteriorate into a battle of competing community leaders, taking the role of experts rather than authentic voices of the community. Nevertheless, disputes should not always be construed as negative. The inability to create consensus around the settlement may not be the product of failed judicial leadership, but a reflection of political reality.¹⁸⁴

C. The Judicial Administration Model

Another group of scholars and judges subscribe to a model of class action governance based on judicial monitoring.¹⁸⁵ Many of these proposals have been inspired by mass tort cases.¹⁸⁶ The subtext of most proposals based on judicial monitoring is that the wrongs vindicated through the class action mechanism are best addressed through governmental regulation, but in the absence of legislative action, the class action requires courts to act like administrative agencies.¹⁸⁷ The central feature of these proposals, strengthening the hands of the court, is not limited to the mass tort context.

1. *The Entity Model.*—One group of scholars has described an “entity theory” of class actions where the class is understood as an entity rather than an aggregate of individuals.¹⁸⁸ Entity theory is not a specific governance mechanism, but rather a reconceptualization of class structure that would change the way procedural rules are applied in class actions. It proposes to abandon autonomy-based approaches to class actions and shift the focus of the Rule 23(a) inquiry on the class as a whole. Scholars have suggested that the entity theory would improve the current law on class actions by rationalizing the mootness

183. *Id.*

184. In *Hart v. Community School Board*, 383 F. Supp. 699 (E.D.N.Y. 1974), Judge Weinstein did not order the special masters’ community redevelopment plan but did exhort third parties to follow the plan. *See id.* at 775; Curtis J. Berger, *Away from the Court House and into the Field: The Odyssey of a Special Master*, 78 COLUM. L. REV. 707 (1978) (describing his experience as a special master in the *Hart* case).

185. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 630-41 (1997) (Breyer, J., dissenting); JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS AND MULTIPARTY DEVICES* (1995); Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13 (1996); Shapiro, *supra* note 21, at 920.

186. *See, e.g., Shapiro, supra* note 21, at 920 (focusing on mass tort because “this has been the principal area of current debate”).

187. *See Amchem Prods., Inc.*, 521 U.S. at 599 (“In the face of legislative inaction, the federal courts—lacking authority to replace state tort systems with a national toxic tort compensation regime—endeavored to work with the procedural tools available to improve management of federal asbestos litigation.”).

188. The entity theory seems to have been first proposed by Edward Cooper. *See Cooper, supra* note 185, at 13.

doctrine, focusing on the actual claim rather than the individual representative, and encouraging a more direct focus on the class and potential conflicts requiring sub-classification.¹⁸⁹

Entity theory would strengthen the trend towards federalization and nationalization of class actions. Under the entity theory, the amount in controversy rules would apply to the class as a whole rather than the individual litigants, and courts could determine whether the amount in controversy has been met on an aggregate basis.¹⁹⁰ The entity theory might also affect the way we think about due process in the class context, making “membership in the litigating class itself a tie to the forum.”¹⁹¹ An entity approach may also dictate that a single law should apply to all class members, thus eliminating the choice of law issues.¹⁹² Although it seems difficult to imagine that the procedural device of the class action should affect the law governing an individual located in his home state, judges approve settlements that do not account for differences in the laws of individual states.¹⁹³ Most importantly, according to Cooper, an entity approach to Rule 23 would focus the court’s inquiry more acutely on the adequacy of the attorney’s representation, where it rightfully belongs.¹⁹⁴ Thus, the entity theory follows up on scholarship that observed that the attorney entrepreneur is the true engine of class action litigation.¹⁹⁵

The entity theory was further developed by David Shapiro, who argued that “the wisest and most efficient way of promoting individual justice” is through collective mechanisms such as the class action lawsuit.¹⁹⁶ The viability of the entity theory in a given context depends on the cohesion of the class and the extent to which the class’ interests are coextensive.¹⁹⁷ This justification for collective treatment explicitly abandons procedural autonomy values in favor of a rough-justice approach to individual claims.¹⁹⁸ It also depends on the purposes

189. *Id.* at 28.

190. *See id.* This is in contrast to an approach to the amount in controversy requirement permitting jurisdiction where it is met by the named plaintiff, like the rule for diversity jurisdiction in class actions. *See* Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356 (1921); Class Action Fairness Act of 2003, S. 274, 108th Cong. § 4 (2003), discussed *supra* note 45.

191. *See* Cooper, *supra* note 185, at 29.

192. *See id.* (describing a uniform choice of law mandate as too extreme and stating, “[a]s a mere procedural device, class treatment cannot alter the conceptual substance of the individual claim, no matter how drastically the claim is affected in fact”).

193. *See, e.g.,* Wolfman & Morrison, *supra* note 5, at 460-61 (discussing approval of settlements despite substantial choice of law issues).

194. *See* Cooper, *supra* note 185, at 31.

195. *See* Coffee, *Understanding the Plaintiff’s Attorney*, *supra* note 24.

196. *See* Shapiro, *supra* note 21, at 916.

197. *See id.* at 922-23.

198. From a political theory perspective, this view might be described as communitarian because greater weight is given to the common good than to the realization of individual rights, based on the idea that justice for individuals is only realized through common good. *See generally* MICHAEL SANDEL, DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY

of the substantive law at issue. Where deterrence is the primary goal, Shapiro argues, an entity approach is more palatable because compensation inherently entails an individualist orientation.¹⁹⁹

The entity theory would “severely limit[] such aspects of individual autonomy as the range of choice to move in or out of the class or to be represented before the court by counsel entirely of one’s own selection.”²⁰⁰ Shapiro proposes that the class might be represented by a group of members who would receive notice and the opportunity to object, in place of the individualized notice currently required.²⁰¹ The focus of the district court’s procedural due process inquiry would shift radically towards the adequacy of the representative and away from notice and opt out requirements.²⁰² Shapiro justifies this call for limited notice and opt outs with a very narrow view of due process rights in the class action context.²⁰³ But he recognizes that this proposal would require, at a minimum, a revision of Rule 23.²⁰⁴ Curtailing the notice requirement would prevent the expense of notice from becoming a barrier for small claims that “deserve[] recognition as a matter of substantive law” and “individual stakes seem to be worth the cost of litigating” but are too small to merit the notice

(1996).

199. See Shapiro, *supra* note 21, at 923-31 (arguing that the main purpose of small claims class actions is deterrence, and therefore the entity approach makes sense).

200. *Id.* at 919.

201. Shapiro argues that the Supreme Court’s interpretation of Rule 23 requires more robust notice, but that due process concerns may be more flexible. See *id.* at 937 (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). This requires a very strained reading of *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). See Monaghan, *supra* note 6, at 1159-63. See generally Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 573 (1997) (arguing that individual notice, hearing and the opportunity to opt out are due process requirements).

202. See Shapiro, *supra* note 21, at 937.

203. Shapiro’s view is that because the Supreme Court did not focus on opt outs and notice in *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356 (1921), and *Hansberry v. Lee*, 311 U.S. 32 (1940), but instead on adequacy of representation as a due process threshold, the former are not truly due process requirements. See Shapiro, *supra* note 21, at 938, 958-59. Shapiro dismisses *Shutts* as essentially dictum and argues that the notice and opt out requirements articulated in that case may not be constitutionally required. See Shapiro, *supra* note 21, at 938, 954-55.

204. Although he argues that due process does not prohibit a looser view of notice and opt out, Shapiro believes that using Rule 23 to move towards an entity model would overstep the Court’s bounds under the Rules Enabling Act and the Rules Decision Act. See Shapiro, *supra* note 21, at 953. In this regard Shapiro focuses on the requirements that individual notice be sent out upon class certification and opt out rights, and argues that the Rule

should be framed in a way that does not place unreasonable roadblocks in the way of movement toward an entity model by responsible policymakers, nor should it impede recognition of the present force and effect of the model in the administration of class actions. At present, the rule may well fail both of these criteria.

Id. at 957.

costs.²⁰⁵

Shapiro advocates a revision of Rule 23 to create stronger judicial oversight of the adequacy of counsel, focusing on the experience of counsel, potential conflicts of interests, and the availability of channels of communication between counsel and a representative group of the class members.²⁰⁶ Judicial review at the 23(e) hearing would then focus on the fairness of settlements overall and as to individual class members. It is not clear from Shapiro's vague description how this revision would be more than a codification of the current regime without opt out or notice protections.²⁰⁷ In comparison to the entities recognized in our legal system, Shapiro's governance solution seems too simple.²⁰⁸ For example, corporations or trade unions have governance mechanisms to select and monitor directors and to regulate membership participation. Corporations, which share some of the agent-principal problems of class actions, are heavily regulated, and subject to mandatory disclosure requirements, proxy voting and market forces.²⁰⁹

From an implementation perspective, the entity theory faces significant hurdles, particularly because notice and opt out requirements are well entrenched in due process jurisprudence and in Rule 23. There are, however, some doctrinal developments that seem to move closer to the entity model. These include the recent revision of Rule 23 to require judicial approval of class counsel,²¹⁰ an increasing focus on the class cohesion by the Supreme Court,²¹¹ increased attention to the conflicts of interests of groups within the class,²¹² and the development of a doctrine of judicial fiduciary duty to the class as a reaction to conflicts of interests problems with class counsel.²¹³

205. *Id.* at 956.

206. *See id.* at 959. This approach holds promise but is insufficiently developed.

207. Shapiro supports his view with reference to other corporate bodies, such as a trade union that may be authorized by the majority of workers to represent them in bargaining or litigation even when an individual worker may not have agreed to that representation. *See id.* at 921. The weakness of the entity theory as a solution to the problem of class action governance is well illustrated by the example of a trade union. While majority vote is an acceptable democratic means of picking a representative, self-selection is not. As Shapiro himself points this out in another example, that of a municipality, "a company town organized and run by one's employer has less to be said in its favor than a truly public municipality." *Id.* at 922 n.18. While Shapiro focuses on this problem in the context of a defendant-defined class, it is equally a problem in a class defined by class counsel.

208. *See* John Leubsdorf, *Pluralizing the Client-Lawyer Relationship*, 77 CORNELL L. REV. 825, 828 (1992) (criticizing entity theories of attorney-client relations that do not provide decision-making arrangements for groups).

209. Recent experience with the failure of corporate governance seems to indicate that more, not less, watchfulness is necessary in the corporate sphere.

210. *See* proposed FED. R. CIV. P. 23(g), described *supra* note 6.

211. *See* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 621 (1997).

212. *Id.* at 626.

213. *See* *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279-80 (7th Cir. 2002) (overturning settlement of class action on grounds that district court did not scrutinize sufficiently whether the

Despite its problems, the entity theory has its appeal. Thinking of the class as a group, rather than as individual litigation multiplied, brings us a step closer to developing a coherent theory of class action governance. But the entity theory needs to do more than reinforce the dictatorial system currently in place.²¹⁴ Its focus on the client, a reference to the traditional system of individual litigation, is also a call for a coherent system of governance that will serve the same control and monitoring functions in the class context that the client does in the individual litigation context. As currently described, however, entity theory does not fulfill its promise.

2. *Relying on Judges: Justice Breyer and Judge Weinstein.*—While no judge has advocated adherence to the entity theory of class actions described above, there are examples of judicial support for a more collectivist or even communitarian view of the class action. Judicial focus in this regard is more on fair outcomes than fair process of group litigation. Two prominent judges have in their opinions and writings adopted an administrative view of group litigation that departs from the traditional atomistic approach: Justice Breyer and Judge Weinstein. Although these judges have considered the administrative model in the mass tort context, their thinking has implications for consumer class actions.

Justice Breyer's concurrence in part and dissent in part in *Amchem Products, Inc. v. Windsor*,²¹⁵ argued that, despite the flaws the majority found in the structure of that settlement, because the tort system was not working and because atomized litigation caused "[d]elays, high costs and a random pattern of noncompensation," a judicially created system of compensation through settlement was appropriate for asbestos claims.²¹⁶ He essentially advocated the creation of a temporary administrative agency with limited appellate review.²¹⁷ Accordingly, he was prepared to review settlements on an abuse of discretion standard that would be significantly more deferential to the district court's decisions than the majority.²¹⁸ Justice Breyer's view acknowledges the extent to

settlement was collusive and failed to quantify the net expected value of continued litigation and stated that "[w]e and other courts have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.").

214. As Cooper notes, it is hard to pretend that the class is a "real" client. "The need for a client is most real in cases that aggregate large numbers of small claims and do not win the involvement of any class members with substantial stakes." Cooper, *supra* note 185, at 31-32.

215. 521 U.S. 591 (1997).

216. *Id.* at 632 (Breyer, J., dissenting in part).

217. See generally Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010 (1997) (proposing that Judge Weinstein's work on mass tort settlements essentially creates temporary administrative agencies).

218. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 631 (1997). In reaching this decision, Justice Breyer underscored the special nature of this settlement as a compensation system preserving money for future illnesses and characterizes the settlement as "unusual in terms of its importance, both to many potential plaintiffs and to defendants, and with respect to the time, effort and expenditure that it reflects." *Id.* at 633. But despite this mitigating language, he appears to

which settlement is a political act, worth the sacrifice of individualist autonomy values for the good of the group.

This argument favors almost any settlement because the alternative can always be painted as very limited or long delayed compensation. Justice Breyer advocated judging the adequacy of representation by results; if the settlement is not patently unfair the higher courts should defer to the lower court's view on the settlement.²¹⁹ By focusing on the fairness of the settlement terms overall, courts shift their attention away from individuals or subgroup conflicts within the class. But this emphasis on outcomes raises serious questions about process. In the class action device, who is the decisionmaker most competent to make fairness determinations? Do we believe that we can evaluate the fairness of a result without looking to the fairness of the process by which it was reached? In the alternative, is an unsatisfactory outcome reached by full and fair process acceptable?

By contrast, the majority opinion in *Amchem* focused on individual interests.²²⁰ How should this differential between individual rights and group compensation be reconciled? Because this tension will always have to be traded off to some extent in class action settlements, perhaps courts should look at the degree to which individual interests have been sacrificed in favor of those of the collective. Because the push towards settlement may be especially strong in difficult and complex cases, we should be concerned when settlement approval depends on a district judge's idiosyncratic estimation of fairness.²²¹

advocate the deferential standard of review for *all* settlements. It is not difficult to argue that every class action presents unique, intractably difficult problems requiring solution at the expense of individual fairness. Cf. Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, 902-03 (1996) (urging the use of the "hard look" doctrine in cases where appellate courts review class action settlements).

219. Justice Breyer describes himself as "agnostic" about the basic fairness of the *Amchem* settlement. 521 U.S. at 639.

220. See *id.* at 629 (Rule 23, "applied with the interests of absent class members in close view," cannot carry the load of this type of administrative model.). Although *Amchem* was a mass torts, positive claim class action, the Court did not distinguish its reasoning from other types of class actions, such as the small claims class actions discussed here.

221. As Justice Ginsburg wrote for the majority in *Amchem*, "the standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind—class certifications dependent upon the court's gestalt judgment or overarching impression of the settlements' fairness." *Id.* at 621. While in his dissent Justice Breyer accused the Court of looking too deeply into the fairness of the settlement, it appears that he himself had also made a determination as to its fairness in light of the state of asbestos litigation. The factors courts consider in deciding whether to approve settlements, set forth in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) and widely used by circuit courts across the country, set forth concrete standards of evaluating settlement fairness. Nevertheless, as Judge Posner's affirmance of the approval of the Blood Factor settlement indicates, these factors do not cabin judges as much as perhaps they should. See *In re Factor VII or IX Concentrate Blood Prods. Litig.*, 159 F.3d 1016, 1018 (7th Cir. 1998) (affirming settlement but describing it as "downright weird").

Within the administrative model there is also a countervailing focus on process and contractarianism. Justice Breyer's insistence on the deferential standard of review bespeaks a trust in district court judges, perhaps subscribing to views expressed by some circuits that judges have a fiduciary duty towards the class.²²² To the extent that there is a divergence between the interests of the judicial system and the interests of the class, however, judicial fiduciary duty may not be enough. Justice Breyer, for example, expresses trust in the process of negotiation between the two sides and focuses on the work that plaintiffs' attorneys put into the settlement in that case.²²³ Unfortunately, the difficulty of negotiations does not guarantee an absence of conflict between plaintiffs' attorneys and the class, nor eliminate the structural incentives for self-dealing.²²⁴

To be effective, judicial administration requires a free flow of accurate and complete information to the judge to exercise her expertise. In fact, however, there are often significant limitations on the information provided to the judge.²²⁵ There is a danger, therefore, that the judge will only rely on the parties for information and be denied any opposing views of facts and law. Although some judges view their role as that of a fiduciary of the class, others view settlement as a type of private ordering over which their oversight role is limited. This variation creates unpredictability, a concern from a governance perspective.

Because it leaves control in the hands of a single actor, the judicial administration model raises some of the same concerns as other expertise models, that it is an "elitist subversion of democratic equality," infringing on individual liberty and simultaneously limiting the self-realization of the class as a group.²²⁶

222. *Amchem*, 521 U.S. at 640.

223. *Id.* at 633.

224. The *Amchem* settlement structure raised very real concerns that class counsel might sell out one portion of the class—or the class as a whole—in favor of their individual clients or, worse yet, in favor of current money and current fees in exchange for small future awards. There was also the specter that attorneys could cut off whole classes of claims in the interest of creating global settlement or simply to settle. The unique problems presented by the settlement addressed in *Amchem* are discussed in Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995), and Wolfman & Morrison, *supra* note 5, at 449-59. For a discussion on the unique aspects of the asbestos litigation, see Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1899 (2002).

225. "Perhaps in no other context do we find courts entering binding decrees with such a complete lack of access to quality information and so completely dependent on the parties who have the most to gain from favorable court action." Issacharoff, *supra* note 7, at 808. This is compounded by the failure of some courts to permit objector discovery and their expressed desire not to delve too deeply into settlement. See, e.g., *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 684 (7th Cir. 1987) ("The temptation to convert a settlement hearing into a full trial on the merits must be resisted.") (citing *Airline Stewards & Stewardesses Ass'n v. Am. Airlines, Inc.*, 573 F.2d 960, 963-64 (7th Cir. 1978)). We should be concerned that case law suggests that discovery rules ought not apply to settlement hearings because the rules "eliminate the efficiency gained by the settlement itself." Wolfman & Morrison, *supra* note 5, at 485.

226. Rubenstein, *supra* note 14, at 1664.

It may result in the loss of vigorous discourse because power is concentrated in the hands of the judge.²²⁷ Moreover, some have argued that this model raises separation of powers issues to the extent that the judge usurps the power of the legislature or executive to create what is essentially a temporary claims administration body.²²⁸

On the other hand, a judicial expertise model has its benefits. It centralizes and unifies decision-making, may lead to better quality and more neutral decisions, and ensure correct allocation of resources.²²⁹ This model also solves the problems of atomization and the difficulty of creating mechanisms for participation by giving power to a neutral decisionmaker without a monetary stake in the outcome of the proceedings.²³⁰ Still, some practical questions remain. What kind of duties does such a judge have towards the class? What kind of flexibility of standards and transfer of power is required to enable the judge to truly live up to this important role? And would the judge's increased involvement in settlements compromise judicial independence? These and other questions have been raised concerning the work and thought of Judge Jack Weinstein, who is the most prominent example of the expansive role a judge might play in settling class action litigation, its pitfalls and possibilities.

Judge Weinstein is perhaps most famous for his involvement in mass tort cases.²³¹ His approach has been to expand the litigation to embrace the entire problem before him through an expansive reading of procedural rules. This is in contrast to judges who traditionally use procedural rules to exclude parties, limit the issues and narrow or even dispose of the litigation before them.²³² Judge Weinstein's approach increases the participation of various involved groups in order to create consensus, while at the same time putting pressure on the parties through various legal rulings. One tool Judge Weinstein has used in pursuit of his goal of global settlement was community-wide consultation.²³³ This practice

227. See *id.* (discussing drawbacks of expertise model in context of attorney leadership of civil rights movement).

228. As Minow explains: "Functionally, court-supervised settlements that establish systems for processing individual claims create temporary administrative agencies without proceeding through the legislative or executive branches." Minow, *supra* note 217, at 2020. Judicial action of this type may "trigger action by the other branches, and thereby promote the vision of overlapping and checking branches of government that lies behind the separation of powers." *Id.* at 2023.

229. See Rubenstein, *supra* note 14, at 1663 (discussing benefits of expertise model in context of attorney leadership of civil rights movement).

230. This is analogous to guardian *ad-litem* proposals. See, e.g., Eric D. Green, *Advancing Individual Rights Through Group Justice*, 30 U.C. DAVIS L. REV. 791 (1997).

231. See generally WEINSTEIN, *supra* note 185; PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1987).

232. Minow, *supra* note 217, at 2013.

233. See, e.g., *Hart v. Cmty. Sch. Bd.*, 383 F. Supp. 699, 756-58 (E.D.N.Y.), *supplemented by* 383 F. Supp. 769 (E.D.N.Y. 1974), *aff'd by* 512 F.2d 37 (2d Cir. 1975) (involving not only school and parents but also teachers union, religious and other community leaders and experts in

is not as rare as it might seem.²³⁴ Judge Weinstein also used his judicial power to consolidate litigation, sometimes through unreviewable preliminary orders.²³⁵ He relied on a creative interpretation of the All Writs Act to transfer cases to his district, a legal strategy no longer available after *Syngenta v. Henson*.²³⁶ These creative rulings, although not part of the traditional judicial role, do not depart from the traditional, dictatorial approach to class action governance.²³⁷ They are an example of a “legal world created almost out of whole cloth by an individual judge.”²³⁸

Despite some concerns, scholars and prominent class action activists have advocated increased judicial oversight as the solution to principal-agent problems, conflicts of interests and lack of fairness in class actions. These authors do not view the problem with class actions as a crisis of governance but as a failure of judicial oversight. They recommend a series of changes to Rule 23 to give judges additional criteria for approving settlements.²³⁹ Similarly, other

various substantive areas in the resolution of civil rights class action).

234. In the *Mexico Money Transfer Litigation*, for example, the district judge heard evidence from leaders in the Mexican-American community as well as elected representatives. See *In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002 (N.D. Ill. 2000), discussed *supra* note 20.

235. Through this mechanism, Judge Weinstein “eliminated” such intractable problems as the various state law claims of class members in the Agent Orange Litigation. Judge Weinstein “vaporized the choice-of-law problem” in the Agent Orange case by issuing a preliminary order that any state court would look to “national consensus law” to determine the manufacturers’ liability, defenses and damages, and therefore the federal court would apply that same national consensus law to all the class members. This creative provisionary order was insulated from appellate review. See SCHUCK, *supra* note 231, at 128-31.

236. See *Syngenta Crop Prot. Inc. v. Henson*, 537 U.S. 28, 34 (2002) (holding that All Writs Act could not furnish removal jurisdiction and removal of cases was prohibited unless the movant could show original federal subject matter jurisdiction, even if petitioners were seeking to remove a case from state court to prevent the frustration of a federal court order).

237. “Outside the sphere of the adversary process and the rule-bound trial system, the settlement process permits room for personal persuasion, input, or pressure from the judge.” Minow, *supra* note 217, at 2028. See SCHUCK, *supra* note 231, at 158-59 (describing the pressure Judge Weinstein put to bear on the parties in Agent Orange and the judge’s role in dictating the settlement amount—one lower than what the parties had agreed to in that case). In discussing this pressure and its propriety, Minow notes “the exposure of the sheer will of the judge on the amount of the settlement works to remind all observers that law, and judging, inevitably reveal and express the views of specific, real persons.” Minow, *supra* note 217, at 2029.

238. Minow, *supra* note 217, at 2030.

239. For example, Wolfman & Morrison, *supra* note 5, propose that Rule 23 should “require the court to reject settlements which provide no compensation for claimants who are giving up potentially viable claims, unless the court finds that the settlement provides benefits to those claimants that are comparable to those claims being abrogated.” *Id.* at 498. They recommend that claims adjudicators should be allowed to take differences in state law and settlement history in various states into account, see *id.* at 499, advocate special scrutiny of non-monetary relief, and propose a new test for non-monetary settlements (e.g. coupons) requiring the deciding court to

scholars advocate guardians *ad-litem* as a prescription to governance problems, hoping that the installation of additional monitoring agents will strengthen judicial oversight.²⁴⁰ These proposals, while useful, are incomplete solutions because they only address the role of the judge, ignoring the roles of other actors in the class action and the extent to which settlements are the results of the interactions of all these players.

III. A PRINCIPLED APPROACH TO GOVERNANCE

Class action governance is the relationship among various participants in determining the direction and outcome of the class action lawsuit.²⁴¹ Fundamental principles of good governance should control the relationships between the class members, the class counsel, objectors and the judges who oversee the suit and settlement. The concrete mechanisms of governance—the specific rules that control the unfolding of these relationships over time—should be designed to realize these broad principles.

No one analogy of governance fits the class action context perfectly. The corporate analogy is not entirely appropriate because claims are not fungible; in other words, there is no market—efficient or otherwise—for class action settlements that will mitigate the separation between ownership of claims and their adjudication. The analogy to democratic processes is incomplete because we are not willing to invest the resources required to obtain genuine direct participation in small claims class actions. The administrative analogy, while in many ways the closest to actual class action practice, does not address the misalignment of interests between class members and their counsel. As described above, the governance structure that has developed, dictatorship by class counsel with more or less judicial oversight depending on highly varying judicial practice, is not satisfactory nor is it required by Rule 23.

Some basic principles are deducible from the provisions of Rule 23 and due process jurisprudence, in conjunction with established principles of governance from the political, administrative and corporate contexts. The fundamental principles proposed here rely on the basic framework of existing due process jurisprudence and the newly revised Rule 23. Within that framework, these principles provide a coherent and systematic legal architecture that takes into account the special problems of class actions articulated in Part I.

Criticisms of previous proposals can also provide some guidelines for principles for class action governance. Market-based incentives take an overly

determine whether the non-monetary relief “provides all or substantially all of the class members a realistic opportunity to obtain valuable relief.” *Id.* at 502. Finally, they make substantial suggestions concerning attorneys’ fees. *See id.* at 503-07.

240. *See, e.g.,* Koniak & Cohen, *supra* note 9 (advocating greater use of guardian *ad litem* to monitor plaintiffs’ attorneys’ performance).

241. *See* ROBERT A.G. MONKS & NELL MINOW, CORPORATE GOVERNANCE 1 (2d ed. 2001) (defining corporate governance as “the relationship among various participants in determining the direction and performance of corporations”).

simplistic view of the class action. For example, market mechanisms fail to address other structural factors that go into decision-making, such as the fact that class actions are a single unique transaction for claimants, and subsequent market penalties for singular instances of mismanagement are inadequate.²⁴² In addition, market mechanisms suffer from the persistence of incentives that encourage attorney collusion and rent seeking without passing on benefits to the class. Finally, creating a market in class actions would likely have prohibitive transactions costs. A robust system of governance needs to account for these structural factors. By contrast, mechanisms relying entirely on popular participation are too expensive to be worth the candle for small claims. Therefore, governance cannot be based on participation. Finally, mechanisms that focus on judicial oversight without attention to attorney incentives, objectors, and other participants, rely too much on judicial discretion by placing nearly the entire burden of process on judges, who may not be institutionally competent because of time constraints, lack of expertise, and lack of desire to construct a complete governance system on their own.

While courts have put much thought into evaluating substantive fairness of class actions, the procedures for ensuring fairness are inadequate.²⁴³ To fill this gap, it is necessary to focus on the principles that should dictate the specific procedural mechanisms employed in class actions. By contrast, corporate governance regimes emphasize procedural governance guidelines, such as voting mechanisms, independent boards of directors and disclosure rules, while courts defer to management on substantive evaluations of corporate business decisions.²⁴⁴ In the near term, a deferential standard, such as the business

242. See EASTERBROOK & FISCHER, *supra* note 149, at 103 (discussing the ineffectiveness of market mechanisms on singular breaches of fiduciary duty in the corporate context).

243. For example, while courts will look at nine factors to determine the substantive fairness of a settlement, they will only look at four procedural factors, only one of which address the real problems in class action governance. See *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) (articulating nine factors for determining whether a settlement is fair). The nine factors are:

(1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. . . .

Id. at 463 (citations omitted); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975) (approving of nine *Grinnell* factors but remanding settlement because objectors were not given full and fair opportunity to be heard). The four procedural factors are discussed *supra* note 87 and accompanying text.

244. See, e.g., *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 953-54 (Del. 1985).

The business judgment rule is a "presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." A hallmark of the

judgment rule, is not appropriate in the class action context. Even if an adequate governance regime were in place, judges cannot presume that class counsel is acting in the best interests of the class when the class action is a single transaction not susceptible to correction by market forces. While governance mechanisms alone cannot assure fairness, healthy governance when combined with a fairness inquiry is the most likely avenue to a robust and reliable class action system.

Procedural rules and standards that are well conceived are more likely to lead to consistent results, build realistic expectations, and reinforce a culture of compliance. There are several benefits to a principle-oriented procedural framework. It is comprehensive because rather than providing limited ad hoc solutions to isolated problems, procedural mechanisms and rules are designed to address all the relationships within the system. It also offers flexibility to both judges and class counsel and therefore encourages creativity in finding the right procedural mix. Finally, it is responsive to the changing landscape of the class action and permits the judge and attorneys to add procedural mechanisms where principles are not being met.

The four fundamental principles of class action settlement governance are (i) maximum disclosure, (ii) an actively adversarial process, (iii) expertise of decisionmakers, and (iv) independence of decisionmakers from influence and self-interest. The disclosure principle is integral both to our political structure and to corporation law. The requirement of an actively adversarial process is unique to the class action context. The principles of expertise and independence of decisionmakers are analogous to similar requirements of boards of directors and are familiar from both the political and corporate context. These four principles encompass most related principles. For example, accountability might be an obvious choice for a principle of class action governance. A combination of strict disclosure rules with an actively adversarial process will result in accountability of class counsel, so an accountability principle is arguably not analytically distinct from these fundamental principles.

The principled approach to governance requires judicial implementation of mechanisms to fulfill all four principles. A complete theory and practice of governance would fulfill these principles at each stage of the litigation. This proposal is confined to settlement, the most contentious moment in the class action suit. The mechanisms themselves may be altered, expanded, and/or contracted, while the principles remain static. Thus, these fundamental principles might be likened to governance guidelines and codes of best practices developed in the corporate sphere.²⁴⁵ Firms can use any number of voting

business judgment rule is that a court will not substitute its judgment for that of the board if the latter's decision can be "attributed to any rational business purpose."

Id. at 954 (citations omitted).

245. See Holly J. Gregory, *Overview of Corporate Governance Guidelines and Codes of Best Practice in Developing and Emerging Markets*, in MONKS & MINOW, *supra* note 241, at 439. Unlike the governance guidelines discussed by Gregory, meeting the principles articulated herein would be mandatory though the specific mechanisms for realizing them would not have to be

mechanisms, appointment strategies and other procedural mechanisms to meet governance guidelines. The same is true of this class action governance regime.

A. Strong Disclosure Requirements

The first and perhaps most important principle for class action governance is the disclosure principle. This principle requires that material information be disclosed to class members, objectors, and judges. The principle of mandatory disclosure is necessary for good class action governance because disclosure of information alters the balance of power, decreases agency costs by enabling monitoring, and has a sanitizing effect.

Information is power. In the current structure of the class action, control over information resides almost exclusively with defendants and class counsel. Class counsel retains expert knowledge about litigation decisions, the substance and viability of claims, discovery, offers, terms of settlements, attorneys' fees, and side-deals. Control over this information provides class counsel with significant leverage over class members and potential objectors. By the manner in which class counsel releases and presents this information, it can control the relationship of class members and objectors to the class action. Thus, class counsel's information is a mode of control.²⁴⁶ The distribution of information mirrors and reinforces the existing power structure, that is, the near total control over the litigation by class counsel with minimal oversight. This prevents challenges to the existing order because the lack of information available to class members, and especially objectors and judges, limits the ability of these important actors to challenge the existing governance structure.²⁴⁷

Mandatory disclosure would alter this imbalance, decentralizing power by preventing the asymmetry of information that currently characterizes class actions. The disclosure principle recognizes that the exercise of power within the

mandatory. There may be significant benefits to making specific, simple, rule-like mechanisms mandatory, as suggested by prominent corporations law scholars in a different context. See Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1916 (1996).

246. See generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1995) (presenting the now widely recognized theory that modern societies exercise power through the collection and use of information, and use this information and surveillance to internalize norms and values so that they become normalized). Foucault's theory of power relationships as discursive, that is, that power is created through discourse and the internalization of categories, has been utilized by scholars of privacy law. See, e.g., Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphores for Information Privacy*, 53 STAN. L. REV. 1393, 1418 (2001).

247. See Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 786-87 (1987) (arguing that regulation of information, whether by the government or new agencies, limits political debate); see also Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 355 (1999) (arguing that the increase in privatization of information reinforces the existing power structure and hinders society's information production and exchange process).

class action is relational. Settlements are not produced solely by negotiation between class counsel and defendants' counsel, but by an interaction of a range of actors, including the attorneys, the court, opt-outs, and objectors.²⁴⁸ Disbursing information to all of these actors will destabilize the controlling role of class counsel and empower other actors to contribute their important voices. Decisions about where information goes and how much will be released will determine the extent to which power is shifted to other actors. In this regard, the disclosure principle mandates maximum disclosure.

Second, disclosure decreases agency costs.²⁴⁹ The most important way that mandatory disclosure reduces agency costs is by enabling informational intermediaries to monitor class counsel.²⁵⁰ In the class action, informational intermediaries may include objectors, who analyze the information provided by class counsel and determine whether or not intervention and opposition to the appointment of counsel or to proposed settlements is appropriate; independent third parties appointed by the court to review settlement proposals or to follow up on the ultimate distribution of the settlement;²⁵¹ consumer advocates looking to prevent abuses;²⁵² and other attorneys looking to set up rival class actions.

Mandatory disclosure compensates for the absence of market competition to measure class actions, and for lack of an ongoing or multi-transactional relationship between class members and class counsel. Sophisticated scholars

248. This argument is similar to that articulated by scholars who write about intermediary organizations in the context of administrative and public law. These authors argue that administrative rules and regulations, as well as public services, are produced by interdependent networks of public and private partnerships rather than by top-down hierarchies. See, e.g., Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121 (2000) (advocating new forms of accountability and arguing that by moving administrative agencies towards an entrepreneurial, incentive-based model, administrators have rendered decision-making less visible); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285 (2003) (critiquing the idea of "privatization" and arguing that public-private partnerships also extend public values to private actors); Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277 (arguing in favor of a problem solving approach that harnesses and recognizes the role of intermediaries in creating norms in the workplace, rather than a top-down code of conduct approach).

249. See William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 COLUM. L. REV. 1701, 1747-57 (1999) (explaining the uses of mandatory disclosure to reduce agency costs and deter agency failure *ex ante*).

250. On the use of informational intermediaries generally, see EASTERBROOK & FISCHER, *supra* note 149, at 292-93. Examples of informational intermediaries in the corporate sphere include underwriters who price stock and auditors who evaluate firms' books.

251. This is similar to instances where class counsel does not take their fee until after the actual compensation has been paid out. In those cases counsel's fee is a percentage of the *actual* settlement amount, not of a projected amount.

252. Public Citizen Litigation Group and Trial Lawyers for Public Justice are examples of such groups.

in the corporate context have argued that disclosure is not empirically proven to prevent fraud or reduce agency costs.²⁵³ Certainly, mandatory disclosure rules did not prevent the recent corporate graft perpetrated by the managers of companies such as Enron,²⁵⁴ WorldCom,²⁵⁵ Tyco,²⁵⁶ and Qwest.²⁵⁷ And because disclosure requires collecting and disseminating information, it is costly.

Even without empirical evidence as to the necessity of disclosure in the context of public corporations, the current disclosure regime for class actions seems merely to create more opportunities for self-dealing. The class members are essentially trapped in the class action. Unlike the management of a corporation, class counsel need not be concerned about attracting additional claimants through good disclosure practices or by proving their reliability. Class counsel need not devise a settlement that treats the class fairly, but merely a settlement not so egregious as to alert the judiciary or activists to its flaws. Class counsel need only be concerned with attrition so significant that it kills a settlement. Such a boycott is unlikely, and even if it were not, judges are generally inclined to approve settlements despite significant numbers of opt outs and objectors.²⁵⁸ Thus, strict disclosure requirements compensate for the absence of the continuing, long-term relationship between class members and class counsel by requiring disclosure of information that an individual client would be able to obtain more easily.²⁵⁹

Third, mandatory disclosure works as an external discipline to increase

253. See EASTERBROOK & FISCHER, *supra* note 149, at 287-97 (arguing that market mechanisms are just as or more likely to create a verification regime to attract capital). But see Merritt B. Fox, *Required Disclosure and Corporate Governance*, 62 LAW & CONTEMP. PROBS. 113 (1999) (arguing that mandatory disclosure is necessary to educate shareholder-voters and assist shareholders to enforce management's fiduciary duties); Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335 (1996) (arguing that mandatory disclosure makes management seek out information it might not otherwise obtain and therefore improve its management strategies).

254. See Paul Beckett et al., *Power Outage: How Energy Traders Turned Bonanza Into an Epic Bust—Unleashed by Deregulation, Industry Greed and Deceit Undid the Nascent Market*, WALL ST. J., Dec. 31, 2002, at A1.

255. See Rebecca Blumenstein & Susan Pulliam, *Leading the News: WorldCom Fraud Was Widespread—Ebberts, Many Executives Conspired to Falsify Results in Late 1990s, Probes Find*, WALL ST. J., June 10, 2003, at A3.

256. See David Armstrong, *Tyco to Restate Financial Results*, WALL ST. J., June 17, 2003, at A2.

257. See Dennis K. Berman & Deborah Solomon, *Ex-Executives Are Indicted in Qwest Probe*, WALL ST. J., Feb. 26, 2003, at B1.

258. Settlements with significant opt outs are often approved. See *supra* note 73 and accompanying text.

259. See Lowenstein, *supra* note 253, at 1344-45 (arguing analogously that disclosure compensates for the absence of long term, knowledgeable shareholders able to sit on corporate boards to represent other shareholders).

internal discipline.²⁶⁰ Class counsel may behave differently when the prospect of transparency looms over them, and thus results may be improved *ex ante*. If sunlight is the best disinfectant,²⁶¹ then the sanitizing effect of mandatory disclosure may work from the inside as well as out—not just catching irresponsible behavior but encouraging better behavior to make disclosure less painful. The other side of this coin is that the absence of standardized disclosure requirements sends a message that hiding and manipulating information is acceptable or at least free of consequences.

Like sunshine laws in the political sphere, disclosure in the class action context builds trust in the settlement process by exposing it to public view. Such trust-building is especially beneficial to the class action bar which has received substantial criticism.²⁶² Unquestionably, disclosure requirements create additional monitoring costs for courts as well as costs for class counsel who must compile materials. There is a trade-off between the costs of complying with disclosure rules and the losses that classes and the public would suffer in the absence of disclosure. Whether disclosure rules will in fact produce social gains in excess of their cost is a matter for empirical study.²⁶³ Even if disclosure does not create greater efficiencies from a market perspective, it is nonetheless a valuable counterpoint to the very serious criticisms of manipulation and lack of accountability that plague class action litigation.

To some extent, every rule regime will encourage potential violators to seek the edges of the rules or to manipulate the rules in order to obtain the best individual result. Moreover, the possibility exists that mandatory disclosure may have unintended negative consequences. For example, a vigorous disclosure regime may chill objectors who have little funding and for whom the expense of disclosure may be too high. Or disclosure may end settlement negotiations too early or give unfair advantage or information to defendants. There are also third-party problems with mandatory disclosure, particularly at the negotiation stage of the class action. Class counsel should not be required to release information that would hurt its ability to negotiate the best settlement for the class. Arguably, it is difficult to determine in advance what information should be privileged.²⁶⁴

For disclosure to be effective, it must be institutionalized properly. To be meaningful, disclosure must be comprehensive, comprehensible, and must happen at the right time in the decision-making process. Because of the potential for manipulation and the need to protect class counsel's ability to negotiate, the

260. For an interesting discussion of this idea in the corporate context, see *id.* at 1358.

261. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW BANKS USE IT* 92 (1914) ("Sunlight is said to be the best of disinfectants; electric light the most efficient police man.").

262. See *supra* notes 9, 31 (describing criticisms of plaintiff's side class action attorneys).

263. If class counsel and defendants are required to release information regarding settlement outcomes after approval, it may be possible to do the empirical work to determine which procedural rules, if any, are making a difference in outcomes.

264. See *Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 684 (7th Cir. 1987) (Posner, J.) ("Discovery of settlement negotiations in ongoing litigation is unusual because it would give a party information about an opponent's strategy.").

question of what information should be disclosed is as important as whether information is disclosed at all. A narrow disclosure standard might include only information material to the decision of class members and judges concerning the substantive fairness of the settlement.²⁶⁵ A broad standard would require disclosure of all information related to the settlement and not subject to privilege, including side-settlements and agreements not currently subject to discovery, without any requirement of a judicial finding of materiality.²⁶⁶ A third alternative would provide a two step process: a mandatory rule requiring the disclosure of certain specific information, in conjunction with a more liberal discovery rule that would permit discovery of information related to the settlement but not covered by privilege. Any of these alternatives would be superior to the current regime, but the most beneficial would be the most open standard, requiring disclosure of all information not subject to privilege.

Comprehensibility of disclosure depends on the audience for the information. Disclosures in notices sent out to the class directly would differ from disclosures to the court, objectors, or the public. In evaluating whether the disclosure principle is met, courts must consider audience, substance, and form, i.e., both the information disclosed and the manner in which it is disclosed. The disclosure principle cannot be met when attorneys provide information in ways that are difficult for the recipient to access or understand.

In notices to class members, there is a tension between completeness and comprehensibility. In complex settlements, notices should err on the side of comprehensibility.²⁶⁷ It is the court's obligation to make notices understandable for the average citizen. The court should determine whether or not the notices are easily understood, both by reviewing them and by testing the notices on a representative group of class members prior to the actual distribution of the notices.

In disclosures to objectors' attorneys and sophisticated third parties, the court's oversight will relate to accessibility. Pleadings, motions, and orders are difficult for objectors to access because the courts where they are filed are often far away and copying court documents is expensive.²⁶⁸ A solution to these access

265. This might echo the standard in the area of securities regulation, requiring disclosure of all information where there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (quoting *TSC Indus. Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

266. See *supra* text accompanying notes 85-86 (describing barriers to objector participation).

267. The notice could provide a two to three page summary of the settlement and make additional information available to interested claimants. Information can also be provided to claimants in a question and answer format which may be more accessible. Disclosures in the notices sent out to class members should be in plain English and in sufficiently large font for the average person to read. Many notices in class actions are so densely written as to be unintelligible even to a well-educated attorney. In addition, these notices are often in ten point font or less and are difficult to read.

268. In my experience, copying filed documents costs from \$.25 to \$.50 per page.

problems would be to require class counsel to post all notices, motions, opinions, orders, and other filings on a public Internet site.²⁶⁹ This way, all information disclosed to the court and necessary for objections would be easily and cheaply accessible to objectors' counsel and interested claimants.

Disclosures should be required both before and after settlement approval. The minimum information necessary for disclosure prior to settlement approval includes (i) the total amount of attorneys' fees sought and method of calculation for those fees,²⁷⁰ (ii) the attorneys' actual expenditure of hours and costs, (iii) any agreements between class counsel concerning labor and fees, (iv) predicted administrative costs for distribution of the fund, (v) the total amount of the settlement fund, (vi) the claimant response rate for similar class actions, (vii) the mean recovery per claimant or the predicted value of any coupon settlement on a secondary market, (viii) the content of any agreement concerning the distribution of excess settlement funds, and (ix) the content of any side agreements between class counsel or defendants and objectors or attorneys filing other class actions arising out of the same conduct by defendant, including the specific amount of any payments. This information should be disclosed prior to the filing deadline for any objections and prior to the Rule 23(e) hearing.

After settlement approval, class counsel and defendants should disclose (i) the total amount of attorneys' fees sought and received, (ii) the total amount of actual administration costs (such as the costs of cutting checks), (iii) the average amount of recovery per claimant who responded, (iii) the number of claimants responding to settlement, (iv) the total settlement fund actually paid to class members, (v) the number of opt outs, and (vi) if applicable, the actual value of any coupon settlement on a secondary market. The revised federal rules help somewhat in this regard by requiring courts to approve awards of attorneys' fees only after submission of a motion and requiring courts to make factual findings and conclusions of law regarding that motion.²⁷¹

Post settlement reports, made under penalty of perjury, will provide policy makers, judges, and objectors a means for evaluating and comparing settlements. It also gives both sides an incentive to make sure that their rosy predictions at the

269. Telephone Interview with Alan Morrison, Director, Public Citizen Litigation Group, Washington, D.C. (July 15, 2003).

270. See *Staton v. Boeing Co.*, 313 F.3d 447 (9th Cir. 2002) (holding that notice of amount of attorneys' fees is required), *opinion withdrawn and superseded on denial of reh'g* by 327 F.3d 938, 963 n.15 (9th Cir. 2003) (determining to "scrutinize the attorneys' fees provisions with special care . . . [because] class notice did not break out the amount of attorneys' fees provided for in the settlement agreement . . ."); *Goldenberg v. Marriott PLP Corp.*, 33 F. Supp. 2d 434, 441 (D. Md. 1998) ("Notice of the potential extent of attorneys fee awards is deemed essential because it allows class members to determine the possible influence of the fees on the settlement and to make informed decisions about their right to challenge the fee award.").

271. See FED. R. CIV. P. 23(h). This brings class action fee issues closer to the rules governing civil rights fee-shifting cases, where courts decide what amount of attorneys' fees are reasonable pursuant to motion. See 42 U.S.C. § 1988 (2000).

fairness hearing are realistic.²⁷² The limited empirical evidence available on this question indicates that self-reporting correlates with superior outcomes.²⁷³ Some class action firms voluntarily provide clauses in stipulations of settlement requiring that some or all of the attorneys' fees be paid after the class has been paid and that the fees reflect the total payout.²⁷⁴ But such disclosure cannot depend on the occasional voluntary act of progressive class counsel.

Objectors play a pivotal role as informational intermediaries. A robust disclosure principle would provide objectors and potential objectors an opportunity to obtain information about all aspects of settlement, including side deals between the participants in the litigation and third parties. Currently, to obtain discovery, objectors must show a reason to believe that the side deal affected the settlement.²⁷⁵ Objectors are unlikely to meet this burden, and given the monopoly class counsel has over the class action and the misalignment of interests, side settlements are inherently suspect. Likewise, objectors who make side deals to drop objections must be required to publicly disclose the terms of all such settlements and to have them approved by the court.

The involvement of these intermediaries raises "superagency" problems, that

272. See *Staton*, 327 F.3d at 958 n.12.

Even when there is no direct proof of explicit collusion, there is always the possibility in class action settlements that the defendant, class counsel, and class representatives will all pursue their own interests at the expense of the class. For that reason, the absence of direct proof of collusion does not reduce the need for careful review of the fairness of the settlement, particularly those aspects of the settlement that could constitute inducements to the participants in the negotiation to forego pursuit of class interests.

Id.

273. For example, in *Pinny v. Great Western Bank*, No. CV 95-2110 (C.D. Cal. 1997), a case study described in depth in the 1999 RAND study, class counsel provided a final report showing the actual settlement paid out, which was nearly identical to what had been predicted. See HENSLER ET AL., *supra* note 2, at 175-84. By comparison, in *Roberts v. Bausch & Lomb, Inc.*, also discussed in HENSLER ET AL., *supra* note 2, at 145-73, the total settlement was presented to the court as approximately \$68 million depending on how many class members claimed rewards. The attorneys were paid \$8 million based on that representation, calculating a fee of a little less than fifteen percent. The parties were not required to report the ultimate payout to the court, but based on SEC filings RAND researchers deduced that the defendant never allocated more than \$37.7 million to pay out all expenses relating to the litigation, including attorneys' fees and administration costs. Thus, there was likely a substantial overpayment to class counsel.

274. See, e.g., Submission of Proposed Stipulation of Settlement, *Tyson v. City of New York*, 97 Civ. 3762 (JSM) (S.D.N.Y., Jan. 5, 2000) (requiring that fees to class counsel be judicially approved and not paid out until administration of class action was completed) (on file with author).

275. See *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1 (1st Cir. 1999). In *Duhaime*, the First Circuit held that objectors could not have access to the substance of a side-settlement between objecting class members who had appealed settlement approval. *Id.* at 4. Non-appelling objectors were denied discovery concerning this side settlement because the court found that the side settlement did not "affect" the main settlement. *Id.*

is, who will monitor the intermediaries?²⁷⁶ The natural answer is judges. Class counsel and defendants complain that many objectors are fee-seeking mercenaries attempting to hold settlements hostage. Objectors' counsel should be held to the same standard as class counsel, but they should not be held to a higher standard that will chill objections.²⁷⁷ Objector intervention will likely increase when objectors' counsel are encouraged by monetary incentives such as the award of attorneys' fees or buy-outs to preserve global peace. Nevertheless, the fear that some attorneys will take advantage of the system, whether they are serving as class counsel or as objectors' counsel, should not prevent courts from encouraging objectors to air the limits or negative aspects of settlement.

B. An Actively Adversarial Process

The adversarial principle requires that the formulation and evaluation of settlements be reached through a vigorous, active adversarial process. This principle recognizes two factors in class action practice. First, active class member participation is impossible and more than likely undesirable in Rule 23(b)(3) class actions. Second, in the absence of client monitoring and involvement, a vigorous adversarial process is necessary to expose inadequate settlements and produce optimal outcomes. Accordingly, rather than focusing on direct participation or class member activism, this principle takes a broader view and redirects our lens to defendants, class counsel, the court, objectors, and the extent to which their relationships can be structured to ensure that the concerns of absent class members are aired and addressed.

The requirement that settlements be reached through arms length negotiation,²⁷⁸ is a poor solution to concerns that settlements are not currently reached through a sufficiently adversarial process that would expose all the competing interests and attempt to resolve them in the most equitable manner possible.²⁷⁹ Even with arms length negotiation, class counsel's interests may

276. See Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999).

277. See *supra* note 100 and accompanying text (discussing chilling effect of sanctions on objectors).

278. See *supra* text accompanying note 87 (discussing requirements for procedural fairness in class action settlements: arms length negotiations, sufficient discovery, proponents were experienced, and limited objections).

279. As Judge Easterbrook so eloquently put it,

Representative plaintiffs and their lawyers may be imperfect agents of the other class members—may even put one over on the court, in a staged performance. The lawyers support the settlement to get fees; the defendants support it to evade liability; the court can't vindicate the class's rights because the friendly presentation means that it lacks essential information.

Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc), *quoted with approval in* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621(1997).

impede her ability to serve the class. Furthermore, once they reach settlement, defendants and class counsel share an interest in getting the settlement approved. Commentators have also lamented that many of the problems in settlement are the result of a lack of adversarial process, which in turn is the result of lack of client monitoring by class counsel.²⁸⁰

Democracy theorists have pointed to participation and deliberation as of one of the salient characteristics of a democratic society.²⁸¹ But direct and active class member participation is impossible because in consumer class actions participation is too expensive in relation to the interests at stake. For instance, democratic process might drain potential recovery to the extent that insufficient resources would be left to attract class counsel.²⁸² Furthermore, because the stakes for individual class members are low, the external investment in participation must be all the more significant to yield results. There are good utilitarian reasons for not investing substantial resources in pursuit of a direct democracy in class action governance.²⁸³ As a society we do not want to invest the amount of resources necessary to render the class action a fully deliberative and participatory process in the way that we are willing to invest in our political process.

This does not mean, however, that there is no room for deliberation in the class action context. Nor does it mean that the only means of participation and communication in class actions need be passive, such as opt-out mechanisms.²⁸⁴ Because of their deterrent and compensatory functions, small claims class actions

280. See Issacharoff, *supra* note 60, at 348 (arguing that even though the Supreme Court warned against the evils of settling without reference to testing of claims in the adversarial process in *Amchem*, that is just what settlement classes are).

281. See Michelman, *supra* note 158, at 1503 (discussing the importance of political participation as a positive human good).

282. See generally Coffee, *Understanding the Plaintiff's Attorney*, *supra* note 24, at 725 (discussing arguments in favor of substantial attorneys fees). For example, in addition to their time and other expenditures, class attorneys are required to pay for notice and conformity with other due process requirements. See *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 177 (1974) (requiring that plaintiffs pay cost of notice). This rule creates an incentive towards settlement-only certifications, because once a settlement has been reached, defendants will often pay the costs of notice and other administrative costs.

283. In other contexts, there may be normative arguments in favor of expensive participation regimes. One could imagine a regime where civil rights class actions would require the creation of a truly deliberative process because of the special connection between civil rights laws and our larger democratic processes. In that case, too, fee shifting statutes require that the violator pay attorneys fees, and thus the additional expenditure on democratic process would not come at the expense of attorney incentives to bring suits. Because those are not the types of class actions discussed here, I leave the question of whether civil rights is a special case to another day.

284. See *supra* Part I.C (arguing that the opt out solution is ineffective because the small claims class action is essentially a non-competitive space during the critical process of settlement approval and noting that while opt outs may be more valuable during certification, class members are hampered by lack of information and the incentive towards reverse auctions).

are a public good. Engaging in a deliberative process in the courtroom is still the best method to probe issues the judge may consider in approving or rejecting settlements. As we saw earlier, decisionmakers will often only address those problems they have studied and measured.²⁸⁵ An adversarial process will improve deliberation by expanding the depth and breadth of the issues brought before the court. Such a process may have the added benefit of helping to form class member preferences in favor of reasonable settlements.²⁸⁶

The size of settlement funds and manner in which these funds are distributed should be the subject of deliberation and discussion. Under the current regime, the class representative is an 'authorized' representative, meaning one to whom the court gives the power to authorize actions on behalf of the class and little more.²⁸⁷ Courts do not look too deeply into the self-interest of class representatives to determine, for example, the effect of additional payments on the class representatives.²⁸⁸ Nor do courts inquire whether class representatives were consulted in the formulation of the settlement.

Fairness hearings provide a perfect avenue for deliberation, but have historically tended to be insubstantial and pro-forma. The doctrines encouraging settlement and limiting review reinforce this reality. Some courts have expressly limited settlement hearings to prevent what they feared would become a full-blown trial on the merits, and fear that increased support of objectors will do just that.²⁸⁹ Such courts take too narrow a view of the fairness hearing.²⁹⁰ Rule 23(e) hearings are intended to protect class members. Class members have only limited means of communicating through (or with) counsel and class counsel have their own set of interests that are not aligned with those of class members. During settlement, class counsel and defendants share an interest in getting the settlement approved, regardless of its objective fairness. In order to expose unfairness, Rule 23(e) hearings should be vigorous and adversarial, involving a variety of agents, including class counsel, objectors' counsel, class members and third parties.²⁹¹

285. See Lowenstein, *supra* note 253, at 1335.

286. See BARTELS, *supra* note 89, at 304 (positing that "actual outcome of political processes must be determined not by preferences alone but also by the structure of political institutions that channel preferences in particular ways").

287. See *supra* Part II.B.1 (discussing the concept of representation in the class context).

288. While such payments may be necessary to encourage class members to participate as representatives in small claims class actions, it also means that their interests are not aligned with those of the class.

289. "The temptation to convert a settlement hearing into a full trial on the merits must be resisted." *Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 684 (7th Cir. 1987) (Posner, J.).

290. See Wolfman & Morrison, *supra* note 5, at 488 (describing a half-hour long fairness hearing).

291. For example, in *Hoffman v. BancBoston Mortgage Corp.*, No. 91-1880 (Ala. Cir. Ct. Jan. 24, 1994), a particularly egregious settlement which resulted in plaintiffs paying more in attorneys' fees than they received in the settlement, there was only one objector. That case is described in

The fairness hearing should be a substantive presentation of several viewpoints on the settlement. In this sense, the fairness hearing will be a kind of trial on the merits of the settlement, although not a trial on the underlying merits of the case.²⁹² Reconceiving the settlement hearing as a bench trial, or even a jury trial, is the working metaphor for the kind of adjudicatory procedure we should be looking for.²⁹³

For a Rule 23(e) hearing to be adversarial, it first requires adversaries, who may be unprompted objectors represented by counsel or objectors solicited by the court.²⁹⁴ In the absence of self-motivated objectors represented by competent counsel, the adversarial principle requires that the court appoint a third party to act as a “devil’s advocate” for the class, such as a guardian *ad litem*.²⁹⁵ Such an appointed “objector” should bring her independent evaluation of the substance of the settlement, as well as its procedure, including the extent to which that procedure has met the four principles discussed here. She should also evaluate opt outs and determine what motivated any decision to opt out. A third-person evaluation of a settlement from claimant’s point of view should expose problems glossed over in the presentation of the settlement by self-interested counsel.²⁹⁶

Another avenue for introducing intermediaries in the absence of vigorous objectors is to appoint advocacy groups such as Public Citizen Litigation Group

Koniak & Cohen, *supra* note 9, at 1058-74.

292. The current view, as discussed *supra* at 86, is that the Rule 23(e) hearing not resemble a trial at all.

293. See Koniak & Cohen, *supra* note 9, at 1129-30 (proposing settlements be heard by juries).

294. See, e.g., *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304 (3d Cir. 1993).

In assessing settlements of representative actions, judges no longer have the full benefit of the adversarial process. . . . In seeking court approval of their settlement proposal, plaintiffs’ attorneys’ and defendants’ interests coalesce and mutual interest may result in mutual indulgence. The parties can be expected to spotlight the proposal’s strengths and slight its defects. In such circumstances, objectors play an important role by giving courts access to information on the settlement’s merits.

Id. at 1310 (citations omitted).

295. See, e.g., Alon Klement, *Who Should Guard the Guardians: A New Approach to Monitoring Class Action Lawyers*, 21 REV. LITIG. 25 (2002) (proposing private monitors who would be paid out of settlement fund). But see Koniak & Cohen, *supra* note 9, at 1111 (discussing problems faced by *guardians ad litem* and stating that “we can report without attribution, for whatever it may be worth, that the guardians we have talked to understand their job is to approve the deal that the settling parties have constructed, after suggesting a few minor changes, not to recommend that the settlement be chucked”). The concern about guardians and other objectors having their own self-interest is discussed below.

296. The value of such independent analysis can be best illustrated in Koniak & Cohen, *supra* note 9, in which these scholars provide a thorough and shocking analysis of a misleading settlement in which class members who received nothing were nevertheless required to pay substantial attorneys’ fees which were deducted from their escrow accounts without their direct consent. One hopes that such a thorough presentation would have affected the court’s decision in that case.

or Trial Lawyers for Public Justice as class guardians.²⁹⁷ Not-for-profit groups are more likely to provide an independent evaluation of settlements and therefore to contribute to the adversarial nature of the process. Objectors' counsel seeking fees, or guardians chosen by the defendants and class counsel, by contrast, are more likely to be subject to influences that could prevent them from opposing an inadequate settlement. If they are independent, state attorneys general or consumer advocacy groups might also serve this intermediary role.²⁹⁸

In most settlements, objectors' counsel (including not-for-profits) need to be encouraged by the payment of fees, just as class counsel does. How much of this type of encouragement should courts provide? It is clear that some incentive is necessary as objectors are a critical part of the settlement process. Courts have held that any objectors who contribute materially to the proceeding may obtain a fee.²⁹⁹ Some courts have interpreted a "material contribution" to include a contribution to the adversarial nature of the proceedings and the provision of representation for a significant group of objectors.³⁰⁰ Other courts have adopted a much narrower approach, limiting the recovery of objectors' counsel's fee to where they "produce an improvement in the settlement worth more than the fee they are seeking; otherwise they have rendered no benefit to the class."³⁰¹ On an

297. These groups are described in HENSLER ET AL., *supra* note 2, at 89-90. The positive involvement of Trial Lawyers for Public Justice in one settlement is described in *id.* at 201-04.

298. See Koniak & Cohen, *supra* note 9, at 1083 (discussing proposal to mandate alerting state attorneys general of all class action settlements).

299. See, e.g., *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1156 (8th Cir. 1999) ("To recover fees from a common fund, attorneys must demonstrate that their services were of some benefit to the fund or enhanced the adversarial process."); *Gottlieb v. Barry*, 43 F.3d 474, 490-91 (10th Cir. 1994) (awarding fees to attorneys for objectors whose work resulted in "a reduction of certain fee and expense awards, and thereby benefited the class"); *Fisher v. Procter & Gamble Mfg. Co.*, 613 F.2d 527, 547 (5th Cir. 1980) ("In opposing the consent decree in a case in which the plaintiffs ultimately prevailed at trial, the objectors benefited their class and helped to vindicate the important public rights protected by Title VII."); *Lindy Bros. Builders, Inc. v. Am. Radiator*, 540 F.2d 102, 112 (3d Cir. 1976) (attorneys fees awarded from a common fund depends on whether the attorneys' "specific services benefited the fund whether they tended to create, increase, protect or preserve the fund"); *White v. Auerbach*, 500 F.2d 822 (2d Cir. 1974).

Accordingly, it is well settled that objectors have a valuable and important role to perform in preventing collusive or otherwise unfavorable settlements, and that, as the district court recognized, they are entitled to an allowance as compensation for attorneys' fees and expenses where a proper showing has been made that the settlement was improved as a result of their efforts.

Id. at 828.

300. See *Elliott v. Sperry Rand Corp.*, 680 F.2d 1225, 1227 (8th Cir. 1982) (*per curiam*) (granting award of attorneys' fees to representatives of objectors who were formerly representatives, and ruling that amount of fees must come from fee set-aside in settlement not from general fund).

301. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 288 (7th Cir. 2002) (Posner, J.); see also *Class Plaintiffs v. Jaffe & Schlesinger, P.A.*, 19 F.3d 1306, 1308-09 (9th Cir. 1994) (*per curiam*) (affirming denial of attorneys' fees for work of attorneys in state court class action settled

abstract level, the latter approach is more narrowly aimed at defeating irresponsible objectors. Just as fees for class counsel should be linked to the benefits they produce for the class, fees for objectors' counsel should be linked to the benefits they produce.³⁰² But a measure of objectors' counsel's fees that is linked too closely with a specific monetary increase in the settlement fund may encourage objectors to withdraw valid objections in order to settle with class counsel, especially when those objections are sufficiently serious to scuttle rather than increase a settlement. Accordingly, the adversarial principle requires a broad view of compensation for objectors' counsel. Under this view, attorneys who make a material contribution to the adversarial nature of the proceedings and assist in the realization of the other principles of governance should be compensated even if they did not produce a monetary improvement in the settlement.

Although opt outs, as currently exercised do not contribute to the adversarial process, some procedural adjustments may improve this situation. First, the timing of opt outs should be altered to permit opt outs *after* the 23(e) hearing rather than prior to the hearing as currently practiced. This would encourage objections by permitting potential opt outs to state their objections and influence the process prior to the adoption of a settlement. It would also allow individual claimants to take advantage of the information adduced prior to and during the fairness hearing in choosing whether or not to participate in the settlement.³⁰³ Second, opt outs might be made a collective right rather than an individual right.³⁰⁴ This would permit state attorneys general or other authorized persons to represent sub-groups for whom the settlement is unfair and may prevent some collateral attacks against settlements.³⁰⁵ Since opt outs do not permit claimants to realize their autonomy, the only way they will constitute an expression of choice is if they are collectivized. Permitting collective opt outs is not so different from authorizing separate representation of sub-groups or the initial appointment of class counsel.³⁰⁶ In both cases, the legitimacy of representation

in federal court class action because the work was attenuated and stating that "[w]e know of no authority which mandates an award of fees to attorneys not formally representing the class, whose activities in representing others incidentally benefit the class").

302. See generally Coffee, *Understanding the Plaintiffs' Attorney*, *supra* note 24 (arguing that fee awards in class actions should be a percentage of recovery rather than the lodestar approach).

303. See, e.g., *In re Brand Name Prescription Drugs Antitrust Litig.*, 115 F.3d 456 (7th Cir. 1997) (barring opt outs from appealing approval of settlement). It seems likely that the opt outs in that case were attempting to use the leverage of individual suits to extract rent from class counsel or defendants.

304. See *supra* note 68 (discussing opt out as an individual right).

305. See *State v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. 2003) (holding that class action settlement did not preclude suit by Vermont residents because Alabama Court lacked personal jurisdiction due to defects in due process protections).

306. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999) (requiring sub-classification where diverse groups within class have conflicts of interests); see also FED. R. CIV. P. Rule 23(g) (requiring court appointment of class counsel).

is in question and the class action risks fragmentation.

A requirement that class counsel communicate with and build consensus among class members, as has been suggested by some commentators,³⁰⁷ is insufficient to comply with the adversarial principle because class counsel is likely to learn from class members only what class counsel wants to know. Representatives might be included in the process by permitting objectors to cross-examine appointed representatives about their understanding of the settlement. In the alternative, an independent “jury” of representative claimants could be presented with the settlement to determine whether or not it is fair.³⁰⁸ Such a jury could be made up of a random selection or a representative cross-section of class members and receive a payment commensurate with the work they do (rather than for approving the terms of a settlement and perhaps the award of attorneys fees). The same problems that plague jury trials would be a problem here, particularly the fear that the claimant jury would lack the requisite expertise or ability to master the issues at stake as well as a judge with substantial expertise in class action litigation and settlement. A jury may be as well placed as a judge to determine whether a settlement is substantively fair once they understand it. Furthermore, it may be more in keeping with our concept of settlements as a type of private ordering to allow a jury of claimants to make this determination. Even if we believe the court is better situated to make fairness determinations, a jury of claimants may be given a consultative role, including the ability to ask questions and express concerns to the judge.³⁰⁹

C. Expertise of Decisionmakers and Agents

Quality of leadership is a well-recognized principle of corporate governance that applies equally in the class action context.³¹⁰ Quality may mean different things for different decisionmakers. The three participants whose expertise is most important are class counsel, judges and objectors’ counsel. With respect

307. See Rubenstein, *supra* note 14, at 1670-71 (proposing requirement of community consultation); Shapiro, *supra* note 21, at 959 (proposing representative group of claimants to curb excesses of class counsel).

308. These representatives should not be persons chosen by class counsel in order to preserve their impartiality.

309. Cf. Mariano-Florentino Cuellar, *Rethinking Public Engagement in the Administrative State* 70-74 (2003) (unpublished manuscript on file with author) (proposing negotiated rulemaking in which persons affected by a proposed rule are given an opportunity to be educated about it and have input with legal effect).

310. For example, Business Week declared “Director Quality” one of five good governance principles that investors should look for. See Louis Lavelle, *Special Report: The Best And Worst Boards: How The Corporate Scandals Are Sparking A Revolution In Governance*, BUSINESS WEEK, October 7, 2002 at 104 (defining “Director Quality” as follows: “Boards should include at least one independent director with experience in the company’s core business and one who is the CEO of an equivalent-size company. Fully employed directors should sit on no more than four boards, retirees no more than seven. Each director should attend at least 75% of all meetings.”).

to class counsel, quality has traditionally meant experience in litigating similar claims.³¹¹ This principle is the one that has been most consistently addressed in the present class action regime, and is expressed in the newly adopted Rule 23(g), which requires the court to evaluate the experience and quality of counsel prior to appointment.

Quality of decision-making as applied to judges is a more difficult concept to discuss, because to raise this issue seems to impugn the intelligence, expertise, work ethic and level of commitment of judges. Already embedded into the structure of class action practice are mechanisms that recognize the importance of experience in complex litigation. For example, Multi-district Litigation panels are an attempt to consolidate decision-making with judges who have special expertise in class actions.³¹² Appellate deference to district court judges' fairness determinations likewise recognizes the importance of expertise, in that case the district court's case-specific expertise.³¹³ Nevertheless, there are some indicia that case-specific expertise is not so important. For example, Multi-district Litigation panel judges do not retain cases referred to them for trial,³¹⁴ and appellate courts do not always defer to the case-specific expertise of district courts.³¹⁵

Finally, objectors' counsel's history and experience, as well as their financial dealings with class counsel and defendants, should also be subject to judicial scrutiny. Standards for evaluating objector's counsel need not be different than those governing class counsel. Objectors represented by experienced counsel will likely be given more attention than objectors without representation.³¹⁶ This may mean that objectors lacking representation will need to have a guardian appointed on their behalf. Experienced not-for-profit objectors, such as Public Citizen Litigation Group, Trial Lawyers for Public Justice, or states' attorneys general should be encouraged to fill this role because of their limited financial interest and their history of responsible involvement in egregious cases.

311. The trend in Rule 23 jurisprudence is towards increasingly specialized substantive areas of class action practice, so that a consumer class action is sufficiently different from a mass tort class action to require separate expertise.

312. See 28 U.S.C. § 1407(a) (2003).

313. See *supra* notes 106, 108, 218 (discussing standard of review).

314. See *Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*, 523 U.S. 26 (1998) (holding that district court judge hearing case pursuant to multi-district litigation statute has no authority to transfer case to himself for trial). There has been significant criticism of this decision and Congress has considered bills to reverse this result. See, e.g., HR 1756, 106th Cong. 1st Sess. (1999).

315. Arguably, in *Amchem Products, Inc. v. Windsor* the Supreme Court made an independent determination of the fairness of that settlement. 521 U.S. 591 (1997). See discussion accompanying *supra* note 218.

316. See *In re Westinghouse Sec. Litig.*, 219 F. Supp.2d 657 (W.D. Penn. 2002) (denying attorney's fees award to pro se objector who benefited class).

D. Independence of Decisionmakers from Influence and Self-Interest

The final principle for class action governance is the independence principle. Independent decisionmakers are decisionmakers who are not likely to gain individually from the decisions they make, so that they are free from incentives towards self-dealing transactions. That class counsel are not independent because of their financial interest in the outcome of class action settlements is the staple of much of the literature on class actions.³¹⁷ As described in Part II, much of this literature focuses on the agent-principal problem and on the incentives influencing the behavior of the attorney as decisionmaker.³¹⁸ Fewer have focused on the role of the judge as decisionmaker.³¹⁹ Both kinds of decisionmakers are necessary to any class action governance regime and class members are forced to rely on their expertise. So too, state attorneys general, objectors' counsel and *guardians ad litem* are not always independent of self-interest. The integrity of all these decisionmakers is particularly of concern where, as in the class action context, they are not selected through an arms-length bargaining process or by popular vote, but by some more suspect mechanism: either judicial appointment or self-appointment.³²⁰

317. Some scholars characterize the attorney self-interest in settlement as an incentive based problem which is not the same as collusion or self-dealing. See Coffee, *Understanding the Plaintiffs' Attorney*, *supra* note 24. Other scholars see this problem as resulting in rampant breaches of fiduciary duty. See Koniak & Cohen, *supra* note 9. This difference is a matter of degree rather than of kind.

318. See, e.g., Coffee, *Accountability*, *supra* note 3 (proposing a competing proxy-type solution to give attorneys incentive to provide better representation); Coffee, *Understanding the Plaintiffs' Attorney*, *supra* note 24 (advocating that attorneys' fees in class actions be a percentage of the fund rather than loadstart to create an incentive to maximize compensation); Macey & Miller, *supra* note 7 (advocating a regime of auctions for class counsel to encourage better quality representation); Fisch, *supra* note 120 (arguing in favor of increased reliance on stronger lead plaintiffs to control attorney excesses); Rhode, *supra* note 111 (arguing for greater ethical obligations for attorneys representing class to seek out class opinions); Rubenstein, *supra* note 14 (arguing, in part, in favor of an expertise model allowing attorneys to make litigation decisions); Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129 (2001) (discussing the difficulties of the lawyer-client relationship in the class action context and the possibilities for abuse); Koniak & Cohen, *supra* note 9, at 1103-19 (arguing for the encouragement of subsequent suits to deter attorney misconduct and collusion in crafting settlements).

319. Two notable examples of articles that take this issue head on are Koniak & Cohen, *supra* note 9, at 1105, 1123-28 (describing the incentives judges have to approve collusive or inadequate settlements); Minow, *supra* note 217 (discussing the tensions created by judicial involvement in settlement making).

320. Proposed Rule 23(g) would require judicial appointment of class counsel. It is not clear, however, whether this change in the rule would make much of a difference from current practice. Koniak and Cohen make a very convincing argument that class action attorneys' use of side deals to remove competing attorneys from the playing field and retain control over the class action

With regards to class counsel, meeting the principle of independent decision-making requires two types of mechanisms, internal and external. The first type concerns internal incentive mechanisms, such as the compensation scheme for class counsel. Internal mechanisms might include an initial auction for services combined with compensation that should rise proportionately to actual claimant recovery, and judicial oversight of the fairness of that compensation in light of the ultimate outcome of the case.³²¹ The problem with pure percentage payments is that they have an arbitrary quality to them. What percentage will sufficiently encourage valid small claims class actions without giving attorneys a windfall out of class members' pockets? Judicial review of attorney compensation or the attorneys' fee motion should be accompanied by an evaluation either by objectors or other intermediaries.³²² This would mimic the corporate use of independent auditors to review filings. Generally, incentive mechanisms based on attorney compensation should be linked to actual benefits conferred rather than predicted outcomes and should bear some relationship to the effort expended by class counsel.³²³ The linking of fees to the actual amount paid out in settlement, rather than counsel's predictions, should be mandatory.³²⁴

Undeniably, fraud or misleading representations can be made even with the protection of 'independent' audits and reporting requirements.³²⁵ This type of malfeasance requires external control mechanisms. Corporate governance scholars have suggested that strong legal remedies with simple bright line rules will produce the best compliance results in an economy with limited resources for enforcement.³²⁶ Such deterrents might include the encouragement of

constitutes a potential antitrust violation. See Koniak & Cohen, *supra* note 9, at 1200-06. As discussed in Part II, such auctions likely will not solve other problems associated with class representation.

321. Rule 23(h) now requires judicial approval of "reasonable" attorneys' fees pursuant to motion, much like civil rights practice.

322. This is to avoid situations in which class counsel bases its fee figure on a percentage of the total compensation fund but only a fraction of that fund is eventually paid out, leaving counsel with a windfall. See discussion *supra* accompanying notes 273-74. For an excellent description of the sophistication of these kinds of abuses, see Koniak & Cohen, *supra* note 9, at 1083-84.

323. The attorneys' fees in most of the egregious cases of poor settlements seem to be calculated based on predictions of benefit for the group rather than actual benefits conferred. See *supra* note 273 (discussing the Bausch & Lomb litigation); see also Koniak & Cohen, *supra* note 9, at 1058-74 (describing Hoffman v. BancBoston Mortgage Corp., No. 91-1880 (Ala. Cir. Ct. Jan. 24, 1994), in which the attorneys' fee calculation was based on moneys claimants already had and not on any benefits conferred by class counsel).

324. See, e.g., *Tyson* class action, discussed *supra* note 274.

325. The role of the Arthur Anderson accounting firm in the most recent corporate scandals is an excellent example of this. See Kurt Eichenwald, *Enron's Many Strands: the Investigation. Anderson Charged with Obstruction in Enron Inquiry*, N.Y. TIMES, Mar. 15, 2002, at A1.

326. See Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1916 (1996) (arguing in favor of bright line rules that are easy to follow accompanied by strong legal remedies on paper to compensate for low probability that these

malpractice suits to deter class action attorneys who take advantage of their client by abusing attorneys' fee allocations, or the use of disciplinary proceedings against them.³²⁷ Scholars critical of the plaintiffs-side class action bar have pointed out that the cost of litigation under the current regime of attorney control make pursuing such suits very difficult for wronged plaintiffs,³²⁸ and have noted that disciplinary regimes can be ineffectual.³²⁹ This is especially so where sophisticated wrongdoing is unlikely to be captured by bright-line rules. In the context of allegations of attorney misconduct, there is a trade-off between bright-line rules and standards. While rules are easily administered, they are likely to be underinclusive, targeting egregious misconduct but missing more sophisticated misconduct. Standards can encompass more sophisticated misconduct, but are difficult to prosecute and may overdeter attorneys from bringing suits.³³⁰ A bright line rule with strong legal remedies for breach is probably the most efficient choice. Even if such external mechanisms only deter the most blatant and egregious abuses, they nevertheless should not be ignored.

Independent and objective decision-making is also an issue for evaluating the work of judges in class action litigation. The court's interest may be at odds with the interests of the class in two ways. First, judges' overloaded dockets create an incentive to approve settlements to dispose of the complex litigation before them.³³¹ Second, judges who take an active role in crafting settlements may be influenced by their own contribution in overseeing the fairness hearing.³³² These issues have generally been glossed over in judicial review of settlements, but

powerful sanctions will actually be applied).

327. See Koniak & Cohen, *supra* note 9, at 1103. It is not clear whether the use of such strong deterrents against objectors is wise given the hurdles that objectors must already overcome. See *supra* note 100 (discussing heavy sanctions against objectors).

328. See Koniak & Cohen, *supra* note 9, at 1106-09.

329. See Lester Brickman, *Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-By-Case Enforcement*, 53 WASH. & LEE L. REV. 1339 (1996) (providing survey evidence to support claim that case-by-case disciplinary enforcement of contingency fee ethics rules does not work and arguing for systematic reform).

330. At the same time, we should not forget that class actions themselves are intended to serve a valuable compensation and deterrent function and that overly harsh penalties can result in an inefficient chilling of one of the only avenues for consumer redress of wrongs. Because we as a society have decided to address most consumer (as well as tort and other) wrongs through the mechanism of group litigation, the elimination or limitation on group litigation in the absence of legislatively imposed penalties or regulatory schemes is likely to result in no enforcement or deterrence of these individually small but collectively substantial wrongs.

331. See Koniak & Cohen, *supra* note 318, at 151 (discussing the possibility that judges seek to approve class action settlements in order to clear their dockets).

332. As Minow points out, judges both declare the law and resolve disputes, and these roles are not always coextensive. Where judges are in their role of resolving disputes, "confidence in the judge becomes the central point of contention." Minow, *supra* note 217, at 2027. This is because the "settlement process permits room for personal persuasion, input, or pressure by the judge." *Id.* at 2028.

should not be.

Expertise and independence are linked to the extent that the most experienced judges are also those most deeply involved in the structuring of settlements. Such judges may have difficulty stepping back at the 23(e) hearing and making an independent assessment of the settlement. Although critics have expressed concern over judges overstepping their bounds, preventing judges from being involved in settlement structuring would be too great a detriment to the governance of class actions. Class members would likely be worse off without judicial expertise in dispute resolution, especially with respect to attorneys' fees questions in which there is a structural incentive for class counsel to engage in self-dealing. The newly adopted changes to Rule 23, now requiring fee motions in class action cases, signal the rule-makers' intentions to expand judicial involvement and oversight.³³³

One method of ensuring judicial independence is to separate the judicial function of overseeing litigation from that of settlement approval. Under such a regime, the judge who oversees the negotiation, and is likely to try the case, would not be the same judge conducting the 23(e) hearing.³³⁴ The 23(e) judge would be less subject to the influences of either the prospect of having to try a complex case or her own intervention in resolving the dispute. The appeal of this solution would depend in part on the cost of gaining case-specific knowledge.

Another method is to require that all settlement negotiations be handled by a magistrate judge, rather than making use of a magistrate discretionary. This solution would have limited effect because it would not remove the incentive for the Rule 23(e) judge to remove the case from his docket by approving settlement. Requiring a separate hearing before a new 23(e) judge would counteract the role of the judge in developing settlements and remove the judicial incentive to dispense with complex cases through inadequate settlements. At the same time, such a solution would permit the same judge who influenced the dynamics of settlement, in part because of the parties' predictions of what the judge would do at trial, to continue involvement in the case if settlement is not approved.³³⁵

There are significant problems with the idea of a Rule 23(e) judge, however. First, to adopt such a scheme is to admit that judges are driven by incentives and influenced by their own deep involvement in cases. It may be perceived as an affront to the ideal of judicial objectivity and independence. Second, a two-judge solution may also be inefficient because of the costs and time for the 23(e) judge to familiarize herself with a complex case. It is difficult to tell whether the costs

333. See FED. R. CIV. P. 23(h) discussed *supra* note 271.

334. Minow proposed a similar experiment, asking "[w]ould it be possible to ready a different judge to proceed with trial so the judge presiding over the settlement process could distinguish that role from the task of judging?" Minow, *supra* note 217, at 2029. This is different from the current practice of permitting a Multi-District Litigation judge to oversee a case until trial in that it separates the judges' negotiation and settlement approval functions.

335. This would resolve a problem, pointed to by Minow, that a two judge solution may prove "destructive to the dynamics of settlement (if it depends in part on predictions of what actually would happen at trial)." *Id.*

of familiarizing a 23(e) judge would exceed the benefits of more objective and independent review of settlements and the freedom it would give the presiding judge to influence settlement discussions.

This tension between judicial dispute resolution and judicial independence is not resolved by the availability of an appeal. The deferential standard for reviewing settlement approval prevents a critical review of settlements that might compel judges to exercise more care *ex ante* to reject unfair settlements.³³⁶ There are two justifications courts provide for this deferential standard of review: first, that the trial judge is most familiar with the litigants, their strategies, positions and proofs, and second, the public policy presumption in favor of settlements.³³⁷ The deferential standard may also be justified by the analogy of the class action to a "quasi-administrative proceeding."³³⁸

The first justification flips the criticism articulated above. Instead of seeing familiarity with the case as a form of bias, the prevailing doctrine of judicial review of class actions views familiarity purely from an efficiency perspective. Even taken at face value, however, this justification loses force where the judge below does not take the fairness hearing seriously.³³⁹ Active involvement and familiarity with the case come at the cost of impartiality and independence. The second justification, a presumption in favor of settlements, requires a logical leap in the class action context. The intuition behind the law favoring settlements must be a contractual one, that private ordering is more efficient, saves judicial and public resources, and resolves conflicts to the satisfaction of both contracting parties.³⁴⁰ But in the class action context, because of the inherent agent-principal problems, the settlement does not represent a contract between the class and defendant but between the *class counsel* and defendant. For this reason, courts

336. "[E]valuation of [a] proposed settlement in this type of litigation . . . requires an amalgam of delicate balancing, gross approximations and rough justice," and the trial court's ruling on the adequacy of a proposed compromise is given great deference. *Detroit v. Grinnell Corp.*, 356 F. Supp. 1380, 1385 (S.D.N.Y. 1972), *aff'd in part and rev'd in part*, 495 F.2d 448 (2d Cir. 1974).

337. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 630 (1997) (Breyer, J., dissenting in part) ("The law gives broad leeway to district courts in making class certification decisions, and their judgments are to be reviewed by the court of appeals only for abuse of discretion."); *Califano v. Yamasaki*, 442 U.S. 682 (1979) (applying abuse of discretion standard); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999) (applying abuse of discretion standard and citing *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975)); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 921 F.2d 1371, 1388 (8th Cir. 1990); *In re Equity Funding Corp. of Am. Sec. Litig.*, 603 F.2d 1353, 1362 (9th Cir. 1979) ("A district court's approval of a class action settlement and plan of allocation of proceeds among plaintiff classes is to be reviewed under the abuse of discretion standard.").

338. *See Phillips Petroleum v. Shutts*, 472 U.S. 797, 808 (1985) (describing the class action as a "quasi-administrative proceeding" from class members' point of view); Richard Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899 (1996) (advocating application of the "hard look" doctrine to mass tort class actions).

339. *See supra* note 13 (discussing limitations of fairness hearings).

340. *But see* Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984).

have held that district court judges have a fiduciary duty to the class and courts have developed a number of procedural and substantive factors to review prior to approving a settlement.³⁴¹

An alternative is a *de novo* standard of review for class action settlement approval. Under this proposal, the problems surrounding class actions are viewed as so intractable and damaging to the perception of our justice system that a higher standard of review is warranted. It seems likely, however, that the same disincentives to reject settlements that apply to district court judges will be applicable at the appellate level as well. Appellate judges are no less likely to want to reduce their docket, especially if they are inundated with class action settlement appeals. Nor are appellate judges going to be less reticent than district court judges to re-open a complex matter that has been resolved.

A third option may be an intermediate standard of review.³⁴² This approach would vary the deference of the appellate courts' standard of review depending on the strength of the protections afforded the class. It would require *de novo* review of the process and protections afforded class members. The measure by which these protections would be judged should be the governance principles articulated in this section—disclosure, adversarial process, expertise and independent leadership—and correlating mechanisms to fulfill each of them. Thereafter, appellate courts would review *de novo* the district court's substantive fairness determinations in cases where governance is otherwise weak. Examples include cases without objectors, where the fee award was protected from an adversarial process because of a 'clear sailing' provision in the settlement agreement,³⁴³ or where no separate Rule 23(e) judge reviewed the settlement prior to approval. Especially in complex and difficult cases, the standard of review should reflect the level of protection received by the class members. The better the mechanisms protecting the class in the first instance, the more deferential the standard of review should be. The underlying assumption of this proposal is that due process requires that the four principles of governance be met robustly in order to bind absent class members.³⁴⁴

341. See, e.g., *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) (listing nine substantive factors and three procedural factors).

342. The dissent in *Amchem* indicated that the majority was indeed applying an intermediate standard of review and that is the reason why the court found the settlement to be patently unfair. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 630-31 (1997) (Breyer, J., dissenting) ("These difficulties flow from the majority's review of what are highly fact-based, complex, and difficult matters, matters that are inappropriate for initial review before this Court."). *Id.* at 630.

343. A "clear sailing" provision is one in which the defendant promises not to contest class counsel's fee request. Such a provision, because it prohibits defendant from objecting to exorbitant fees, exacerbates the conflict of interest between class counsel and the class and further erodes the adversarial aspects of the fairness hearing.

344. This would mean that the right to collateral attack would depend on whether the four principles of governance were adequately reviewed, because collateral attack on a judgment binding class members is available where there has been a violation of due process. For enlightening discussions on this topic, see Monaghan, *supra* note 6 and Kahan & Silberman, *supra* note 47.

Like other actors in the class context, the independence of objectors and other intervenors from external influence—by defendants or class counsel—should also be measured. While objectors should be encouraged, they must also be monitored and subjected to the same governance requirements as class counsel. This is because the very leverage that permits objectors to destabilize settlements and obtain gains for the class also allows them to draw scarce resources from the class members with the threat of holding hard-fought settlements hostage. The independence of community groups and states' attorneys general may be at issue, particularly in settlements that provide for *cy pres* funding for those groups or give away benefits to persons outside the class. State attorneys general or community representatives, for example, may be inclined to support settlements that give away money to their constituencies even if they do not compensate the consumers harmed.³⁴⁵ Independence of *guardians ad litem* may be questioned where they are appointed by the defendants and class counsel, or where they are paid out of the settlement fund or only paid if the settlement is approved. Courts should scrutinize the interests of intervenors in settlements that do not provide cash payments to claimants particularly carefully. Side agreements between objectors and class counsel at any stage of the litigation should be reviewed with close attention by courts.³⁴⁶

Control of objectors' counsel's fees is another means to assure independence.³⁴⁷ Objectors' counsel have a perverse incentive to get a settlement approved (albeit with their proposed changes) so that they can get paid. If they succeed in scuttling a settlement, they will ordinarily not be paid unless they manage to strike a new deal with the defendants. Thus the least mercenary objectors, such as public interest organizations, are least likely to be paid for their efforts. Some might argue that this incentive is not perverse but in fact beneficial, because it pushes objectors to try to work within a hard-fought settlement and save the costs of renegotiation. Nevertheless, this incentive is just as likely to allow defendants and class counsel to get away with too much. This problem might be solved by requiring defendants and class counsel to post a bond. If the court rejects the settlement as unfair to class members, objectors' counsel who succeeded would be paid a reasonable amount out of that bond. This would put some incentive in the hands of defendants not to go forward with settlements that they know to be patently unfair.³⁴⁸

345. See, e.g., *In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347 (E.D.N.Y. 2000) (attorneys general supported settlement provided for contribution of toys worth \$36.6 million to states).

346. This would require a departure from the current practice and the revised rules, which currently only require the reporting of the existence of such side-settlements. See FED. R. CIV. P. 23(2) (2).

347. This criticism applies equally well to *guardians ad litem*.

348. Without a doubt, the defense bar would oppose such a requirement. The burden of the bond could be put on class counsel, but this would simply reinforce the antagonism between objectors' and plaintiffs' counsel and succeed in erasing the role of the defendant in forming the settlement. Policy makers should not forget that defendants also have a role in producing inadequate settlements.

A truly adversarial process is impossible without stringent court oversight over the independence of decisionmakers and intermediaries from self-interest and influence. This will depend in some part on the court's discretion, but the inquiry into the interests of these players in conjunction with the institution of specific procedural safeguards should eliminate some of the "chancellor's foot" problems created by unfettered judicial discretion.

CONCLUSION

The problems of class action abuses are a result of a failure of the existing governance regime. In place of that flawed regime, this Article proposes a system of governance for small claims damages class actions in the settlement process based on the four fundamental principles of disclosure, an actively adversarial process, agent expertise, and independence of decision-making. These principles form a comprehensive approach to class action settlement governance, requiring a number of mechanisms that should be implemented in all small claims damages class action settlements. By thinking of the class as a group in need of governance, and taking a comprehensive rather than piecemeal approach to determining what that governance should be, we can begin to have an understanding of the nature of the class as an organization, to improve the functioning of that organization, and to create a fair process more likely to yield fair substantive results.